UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

WINDSOR REDDING CARE CENTER, LLC, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 18-1299 [NLRB CASE NOS. 20-CA-070465, 20-CA-070964, 20-CA-075426, 20-CA-082287]

PETITION FOR REVIEW

Petitioner Windsor Redding Care Center, LLC, d/b/a Windsor Redding Care Center, hereby petitions this Court for review of the Decision and Order of the National Labor Relations Board dated July 17, 2018, as corrected on August 15, 2018, in the within matter. A true and correct copy of the Decision and Order, as corrected, is attached hereto.

DATED: November 2, 2018

Respectfully submitted,

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By: _____

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Windsor Redding Care Center, LLC *and* SEIU United Service Workers-West, CTW, CLC Cases 20–CA–070465, 20–CA–070964, 20–CA–075426, and 20–CA–082287

July 17, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On December 31, 2012, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Union filed exceptions with supporting argument, the Respondent filed an answering brief, and the General Counsel filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated the National Labor Relations Act by suspending and terminating housekeeper Denise Whitmire and restorative nursing assistant Angela Rowland and, further, that the Respondent unlawfully failed to engage in prediscliplinary and postdisciplinary bargaining with respect to both employees. The complaint also alleges that the Respondent unlawfully failed to bargain over its unilateral decision to suspend its merit raise program. The administrative law judge dismissed the complaint in its entirety. We agree with the judge that the Respondent did not violate the Act by suspending and discharging Whitmire or by failing to engage in prediscipline or postdiscipline bargaining.[3] For the reasons stated below however, we disagree with the judge's conclusions as to the suspension and discharge of Rowland and as to the suspension of the Respondent's merit raise program.

I. SUSPENSION AND DISCHARGE OF ANGELA ROWLAND

Angela Rowland was a longtime employee of the Respondent, rising from the position of housekeeper to restorative nursing assistant. Since the advent of the Union, she was also an open and active supporter: she was involved in the initial organizing drive; she participated in two picketing events at the Respondent's facility; she appeared on local television as a spokesperson for the Union; she displayed prounion signs on her car when it was in view of coworkers, management, and the public;

[1] In its answering brief, the Respondent moves to strike the Union's exceptions. Of the requirements contained in Rule 102.46(a)(1), the Respondent contends that the Union's exceptions are deficient solely because they fail to contain citations to the record. Although the Union's exceptions do not contain pinpoint citations, we find that the exceptions substantially comply with the Board's requirements because they refer to record evidence. See *St. George Warehouse, Inc*., 341 NLRB 904, 904 fn. 1 (2004), enfd. 420 F.3d 294 (3d Cir. 2005). Accordingly, we deny the Respondent's motion to strike.

After the briefing period, the General Counsel filed a letter pursuant to *Reliant Energy*, 339 NLRB 66 (2003), and the Respondent filed a reply letter.

Also after the briefing period, the General Counsel moved to withdraw his exceptions to the judge's dismissal of the prediscipline bargaining allegation; the Board granted that motion in an order dated May 24, 2016. The Union continues to except to the dismissal of that allegation.

[2] The General Counsel and the Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In dismissing the allegation with respect to Denise Whitmire, the judge found that the Respondent satisfied its rebuttal burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). We agree. The central question here is whether the Respondent established that it *would* have suspended and discharged Whitmire absent her union conduct, *not whether we think it should have done so*. As our dissenting colleague acknowledges, unlike the other employees who also failed to report the suspected elder abuse at issue here, Whitmire additionally destroyed the evidence of that suspected abuse. From the record, it appears that this is the first time that the Respondent has been confronted with such a situation. Once it was, the Respondent interviewed several employee witnesses, including Whitmire herself. Based on the information it collected, the Respondent discharged her pursuant to its policies, as discussed by the judge. Under these circumstances, we are unwilling to substitute our judgment for that of the Respondent. However, in adopting the judge, we do not rely on his interpretation or application of federal and state laws governing "mandated reporters." Rather, we rely on his analysis only insofar as he found that the Respondent had a reasonable belief that Whitmire failed in her legal duty as a "mandated reporter."

For the reasons set forth in her separate opinion, Member McFerran dissents with respect to the suspension and discharge of Whitmire.

In adopting the judge's dismissal of the predisciplinary bargaining allegation, we rely on the fact that, at the time of these events, the Respondent did not have a legal duty to bargain prior to imposing discipline. See *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016). We additionally rely on the judge's finding that the Union did not request such bargaining for either Whitmire or Rowland. As found by the judge, the Union's requests to bargain on April 22 and 23, 2011, appear to concern discipline imposed under the Respondent's attendance policy, which did not serve as the basis for the suspension and discharge of either employee. And the Union's request to bargain over discipline on May 12, 2011, expressly related to employees other than Whitmire and Rowland.

Members Kaplan and Emanuel express no opinion whether *Total Security Management* was correctly decided.

she served on the union bargaining committee; and she acted as a steward.

In May 2012,[4] the Respondent decided to suspend and terminate her. The asserted basis for this discipline was Rowland's purported act of verbal abuse on May 24. The judge found that, on that day, Rowland accompanied a particularly difficult resident to a nearby doctor's office. The Respondent was aware that this resident suffered from dementia and was prone to bouts of yelling, screaming, and threatening, sometimes in different voices and generally accompanied by profanity. Three medical assistants at the doctor's office reported that when Rowland, the resident, and a driver entered the office, they heard two distinct voices yelling at the same time. Although the assistants could not see who was speaking, they identified one of the voices as the resident's. The second voice, which they identified as Rowland's, said, "If you don't knock it off, I'm going to beat your ass." After discussing what they had heard amongst themselves, the assistants decided to notify the Respondent.

Surprised by the accusation, the Respondent's administrator, Anne Gilles, immediately drove to the doctor's office to investigate. There, she interviewed the two assistants who were still on duty. They confirmed their account. Gilles also questioned the driver, who dismissively said, "I know nothing. Nothing happened." When Rowland returned to the Respondent's facility, Gilles suspended her pending an investigation.

On May 25, Gilles returned to the doctor's office to interview the two medical assistants again and interview the third medical assistant for the first time. Even after Gilles reminded them of the resident's tendency to yell in different voices and use profanity, the three assistants confirmed their account.

Later on May 25, Rowland returned to the Respondent's facility to have Gilles sign a document authorizing her absence. Rowland was accompanied by a coworker. The three first discussed the incident involving the resident. Gilles mentioned that the resident's husband and daughter both praised Rowland's care of the resident and said the comment sounded like it would have come from the resident, not Rowland. Gilles then turned the conversation to the Union. Gilles opined that it was wrong for the Union's signs to criticize the Respondent's patient care, thus giving the Respondent a bad public image, and said that the signs should instead be confined to the parties' ongoing contract dispute. Rowland's coworker objected that the meeting was not about the Union. Gilles replied, "Oh no. This is about the Union. This is all about the Union." Soon after the meeting, the Respondent decided to terminate Rowland.

Subsequent to the termination, the Respondent continued its investigation. Both Gilles and her superior, the regional director, spoke or attempted to speak to the driver and the three medical assistants. Gilles testified that she did so because she was distressed by Rowland's termination, particularly given Rowland's otherwise good employment record. The regional director acknowledged that it was "pretty unusual" for him to participate in such an investigation and that it's "not often that [he] would drive to a facility and conduct a face to face interview" himself. He offered two justifications for his personal involvement: (1) he was struck by the fact that individuals not employed by the Respondent reported the abuse, and (2) he wanted to ensure that Gilles had adequately investigated the situation given Rowland's position in the Union.

The judge, applying *Wright Line*, dismissed the complaint allegation regarding Rowland, finding that, although the General Counsel carried his initial burden of establishing that Rowland's protected union activity was a motivating factor in her discharge,[5] the Respondent established that it would have discharged Rowland even absent that protected activity.[6] Based on the credited evidence, we disagree with the judge that the Respondent carried its rebuttal burden.[7] The central question here is whether the Respondent established that it *would* have suspended and terminated Rowland's employment absent her protected union activity, not merely that it *could* have done so.[8]

To begin, we agree with the judge's finding that the General Counsel met his initial burden. Gilles's extraordinarily candid statement regarding the Respondent's motivation for taking action against Rowland—"Oh no.

[4] Unless otherwise stated, all dates are in 2012.

[5] No party excepts to the judge's conclusion that the General Counsel carried his initial burden.

[6] Member McFerran notes that "proving that an employee's protected activity was a motivating factor in the employer's action does not require the General Counsel . . . to demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." See *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014), enfd. sub nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015).

[7] For the reasons stated in his separate opinion, Member Emanuel dissents on this issue.

We find it unnecessary to rely on the judge's citation to *Wal-Mart Stores*, 352 NLRB 815 (2008), which was decided by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). We further note that the Board reaffirmed *SFO Good-Nite Inn, LLC*, 352 NLRB 268 (2008), in a decision reported at 357 NLRB 79 (2011), enfd. 700 F.3d 1 (D.C. Cir. 2012).

[8] See, e.g., *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

This is about the Union. This is all about the Union."—occurred in the midst of a meeting initiated by Rowland and Martinez to discuss Rowland's suspension. After discussing that topic, Gilles gratuitously turned the conversation to the Union, criticizing its tactics. Even after Martinez tried to steer the conversation back to the issue at hand, Gilles would not be deterred, making this significant admission. Soon thereafter, the Respondent discharged Rowland. The progression of this conversation, culminating in the quoted statement, and the fact that it occurred so near in time to the decision to terminate establish a substantial showing of animus.

We further find that the Respondent failed to carry its rebuttal burden. We acknowledge that the Respondent likely *could* have disciplined Rowland for engaging in the conduct for which she was accused.[9] In fact, at the hearing, Rowland acknowledged as much. However, the Respondent has failed to prove it *would* have done so absent her protected union activity. Initially, we find that the record contains evidence of disparate treatment. For instance, the Respondent treated Rowland more severely than certified nursing assistant Nancy Antonson, even though the latter was also accused of abuse. According to the record, the Respondent had previously disciplined Antonson for making inappropriate comments and facial expressions to residents, for leaving residents who were fall risks sitting on the edge of their beds, and for not taking residents to the bathroom with sufficient frequency. Then on April 27, a resident complained that Antonson roughly handled her during her morning routine. Despite the resident's plea to be gentler, Antonson continued handling the resident roughly. Later after a shower, the resident had a bowel movement accident. Antonson rolled her eyes and exclaimed, "You've got to be kidding." Antonson again handled the resident roughly as she cleaned her. The Respondent filed a report of suspected dependent/elder abuse with the state. In contrast to Rowland, however, Antonson only received a final written warning for this latest act of misconduct. The Respondent failed to explain why it reacted differently to an arguable act of physical abuse than it did to an arguable act of verbal abuse.[10]

Additionally, the continuation of the investigation even after the discharge undercuts the Respondent's position here. Gilles testified that she harbored significant doubt as to the veracity of the statements Rowland purportedly made. Likewise, the regional director testified that he took the highly unusual step of becoming personally involved in the interview process because he wanted to ensure that a thorough investigation was conducted. In light of this testimony, however, it seems only logical that the Respondent would have waited to terminate Rowland until it completed this important investigation, particularly given her otherwise good employment record. The fact that the Respondent failed to do so suggests that the Respondent would not have taken the same action based on her purported comments alone. Cf. *Lowery Trucking Co.*, 200 NLRB 672, 677 (1972) (observing that employer's continued investigation after terminating employee supported finding discharge unlawful).[11]

Thus, in light of the Respondent's admission that its discipline of Rowland was "all about the Union," we find that the Respondent failed to establish that it *would* have discharged Rowland absent her protected union activity. We therefore conclude that the Respondent violated Section 8(a)(3) and (1) when it suspended and discharged Rowland.

II. FAILURE TO BARGAIN OVER THE SUSPENSION OF THE MERIT RAISE PROGRAM

The General Counsel also alleges that "[s]ometime in June 2011, Respondent stopped its practice of granting wage increases to . . . employees commensurate with their annual performance evaluations on or near the anniversary of their respective date of hire."[12]

According to the credited testimony, at least since 2005, the Respondent received guidance from its parent corporation on the permissible range of merit raises. The guidance was based on the following factors: Medi-Cal and Medicare reimbursement rates, the profitability of the local facility, the economic and competitive envi-

[9] Unlike the judge, we find it unnecessary to determine whether Rowland actually made the threat in question. Instead, we adopt the judge's findings only insofar as he concluded that the Respondent had a reasonable basis for believing Rowland threatened the resident given the statements by the three ear witnesses.

[10] We additionally disagree with our dissenting colleague's suggestion that the Respondent found the accusations against Antonson less credible than those against Rowland. The Respondent does not advance such an argument. Further, the records of Antonson's discipline and the reasons advanced for the Respondent's continued investigation of Rowland postdischarge, as discussed below, belie that suggestion.

[11] Unlike our dissenting colleague, we find *Lowery Trucking* comparable to this case. In *Lowery*, the Board found that the "continuation of the investigation after the discharge suggests Respondent was unsure of its ground for discharge" and, therefore, that the respondent was motivated by its desire to rid itself of the prounion employee. Id. at 677. Analogously, here, the Respondent's stated reasons for the continued investigation cannot be reconciled with the fact that the Respondent terminated Rowland before the investigation was concluded. This conflict suggests that, in fact, an unlawful motive was behind Rowland's termination—a motive confirmed by Gilles' extraordinary admission.

[12] At the hearing, the General Counsel amended this allegation of the complaint, without objection from the Respondent, to clarify that it covered the period from June 1, 2011, to August 1, 2012.

ronment of the local facility and the industry, the local wage index, competitive wages in the marketplace, and the local facility's budget. Within the given range, the Respondent would then award employees merit raises based on their individual evaluations. The Respondent's regional director testified,

> Merit increases are arranged and it could be anywhere from a zero to depending upon the year it could be two, three, four percent depending on what the economics were and what we had budgeted for that given year. So employees had to be evaluated based on their individual performance and then they would be so compensated after their evaluation was complete.

These evaluations occurred on or around the employee's anniversary date. The regional director's testimony is consistent with the most recent employee handbook, which states that the Respondent would typically evaluate each employee annually and that individual raises and promotions are within the sole discretion of the Respondent and depend on a number of factors in addition to employee performance.

The parties introduced documentary evidence to support their respective arguments. We agree with the judge that the information contained in the exhibits could have been presented in a more straightforward manner. Specifically commenting on Respondent's Exhibit 35, the judge observed that, while a majority of the employees do seem to have received an increase of around 3 percent in 2009, 2010, and 2011, numerous other employees received no annual wage increase at all, some received an increase less than 3 percent, and a few received an increase greater than 3 percent. Our review of the exhibit leads us to similar observations. It appears that the Respondent authorized raises on or near its employees' anniversary dates approximately three quarters of the time during these 3 years. And although merit raises ranged from 1/2 to 6 percent, the vast majority were approximately 3 percent.

As for the specific raises in question, the State of California and the Federal Government apprised the Respondent in the summer of 2011 that they would soon begin making significant cuts in Medi-Cal and Medicare reimbursements.[13] In August 2011, the Respondent notified the Union that it was suspending merit raises as a result of these cuts. The Respondent further informed the Union that, if the Medi-Cal cuts were subsequently rescinded, as promised by the State of California, it would resume giving merit raises.[14] To that end, the Respondent kept a list of employees who would receive retroactive raises if the cuts were rescinded. However, the Respondent refused the Union's demand to bargain over its decision, stating that, because raises are dependent on government reimbursement rates, it was following past practice by discontinuing raises due to the significant cuts.

The Medi-Cal cuts were rescinded in May 2012 and, thereafter, the Respondent resumed granting raises. Later, the parties agreed in their August 2012 collective-bargaining agreement that "[e]ffective on the employee's anniversary date prior to August 1, 2012, each employee shall receive a wage increase of 1-3% accompanied by an evaluation supporting the amount of the increase."

The judge dismissed the complaint allegation, finding that any decision to award merit increases was discretionary on the part of the Respondent, with no set amount of increase or even any increase at all. Alternatively, he found that, even if the Respondent had unlawfully deviated from its past practice, the Respondent lifted the suspension and fully compensated employees per the collective-bargaining agreement, so the allegation was moot. We disagree on both counts.

The Board has long held that

> [a] merit wage-increase program constitutes a term or condition of employment when it is an established practice . . . regularly expected by the employees. Factors relevant to this determination include the number of years that the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof.

United Rentals, 349 NLRB 853, 854 (2007) (internal quotes omitted).

Based on the credited testimony and documentary evidence described above, we find that the Respondent maintained a merit raise program as a term and condition of employment. See *Mission Foods*, 350 NLRB 336, 337–338 (2007); *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1263–1265 (1997), enfd. in pert. part 176 F.3d 1310 (11th Cir. 1999); *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996).

[13] The state cuts were effective starting in June 2011. According to Respondent's Exhibit 33, the Respondent owed retroactive raises back to that date.

The exhibit also indicates that the Respondent owed at least two employees retroactive raises from April 2011. The failure to pay the raises for those additional months is outside the scope of the complaint, so we need not pass on them.

[14] As the regional director testified, "The conversation we had with the Union at that time is we were—we need to freeze the wages until we understand what's going on. We made the commitment across the table many times, at that meeting and many times after that, if we get the money back from the State of California, we will pay you."

The evidence establishes that, since 2005, the Respondent's parent corporation would, based on a set of predetermined factors, authorize its local facilities to grant yearly merit raises to employees within a certain percentage range. Thereafter, the local facility would grant merit raises to each of its employees within that permitted range (typically around 3 percent) according to the employee's evaluation.

Because it had a past practice of granting merit raises, the Respondent was obliged to maintain the fixed elements of that program—specifically here, the timing of the raises. See *Daily News of Los Angeles*, supra at 1239. By deviating from its practice without affording the Union an opportunity to bargain, the Respondent violated the Act.[15]

Additionally, we disagree with the judge's alternative conclusion that, because the Respondent has subsequently resolved this allegation with the Union, the allegation is moot. The judge cited no precedent in support of his finding. In *Mid-Wilshire Health Care Center*, 337 NLRB 72 (2001), however, the Board confronted a similar case and came to the opposite conclusion. There, the employer raised wages in accordance with a tentative collective-bargaining agreement, but quickly rescinded the increases. After further negotiations, the employer retroactively restored the raises. The Board observed, "This violation was not rendered moot because the Respondent, having *previously* ignored its bargaining obligation, *subsequently* discussed the matter with the Union and ultimately reinstated the wages increases." Id. at 73. The employer's conduct went to the remedy, not the violation. Id. at 73 & fn. 7. The same is true here.

Accordingly, we conclude that the Respondent violated Section 8(a)(5) and (1) by unilaterally suspending its merit raise program.[16]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 7.

"7. The Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging employee Angela Rowland."

2. Add the following Conclusions of Law.

"8. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally suspending its merit raise program."

"9. The Respondent did not otherwise violate the Act."

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we will order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging employee Angela Rowland because she engaged in protected union activity, we shall order the Respondent to offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed. We shall further order the Respondent to make Rowland whole for any loss of earnings and other benefits suffered as a result of its unlawful conduct. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall additionally order the Respondent to compensate Rowland for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement

[15] Unlike the judge, we find *News Journal Co.*, 331 NLRB 1331 (2000), distinguishable. In that case, the question presented was whether the employer unilaterally discontinued its discretionary practice of granting merit raises. Even though the number of employees earning the raises decreased in that case, there was no evidence that the employer had altered or discontinued its practice. See *Washoe Medical Center, Inc*., 337 NLRB 202, 202 (2001). Here, of course, the Respondent readily admits that it suspended its merit raise program in reaction to the substantial cuts in Medicare and Medi-Cal. Thus, the more pertinent question for us is whether the Respondent had a past practice of granting merit raises in the first place. For the reasons articulated above, we find that it did.

The Respondent vehemently argues that "it did *not have an established past practice whereby* employees automatically received an increase in pay, let alone a 3% increase, at the time of their performance evaluation." (Respondent's Ans. Bf. at 43.) We do not find that it had that specific practice. But its argument does not address the broader question raised by the complaint allegation—i.e., whether the Respondent stopped its general practice of granting wage increases to employees commensurate with their annual performance evaluations or near the anniversary of their respective date of hire.

[16] Given that the Respondent has already lifted the suspension, we need not affirmatively order it to do so. Further, the Union and the Respondent agree that the 2012 collective-bargaining agreement adequately remedies the Respondent's unlawful conduct for the period of January 2012 through August 2012. The Union and the Respondent disagree as to whether the contract settlement covers the period of June 2011 through December 2011. Agreeing with the Respondent, the judge found that the contract covered this earlier period as well. We see no reason to disturb his finding. Out of an abundance of caution, however, we will order the Respondent to make affected employees whole consistent with the settlement reached in the 2012 collective-bargaining agreement. We will resolve any continued disagreements regarding the Respondent's obligations under this provision of the contract in the compliance proceeding.

or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). We shall also order the Respondent to compensate Rowland for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers*, 364 NLRB No. 93, (2016). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally, we shall order the Respondent to make affected employees whole for any loss of earnings and other benefits attributable to its unlawful suspension of its merit raise program consistent with the settlement reached in the 2012 collective-bargaining agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Windsor Redding Care Center, LLC, Redding, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting SEIU United Service Workers-West, CTW, CLC, or any other labor organization.

(b) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Angela Rowland full reinstatement to her former job or, if that job no longer exist, to substantially equivalent positions, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Angela Rowland whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the suspension and discharge will not be used against her in any way.

(d) Compensate Angela Rowland for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(e) To the extent it has not already done so, make employees whole for any loss of pay and other benefits suffered as a result of the unlawful suspension of its merit raise program, in the manner set forth in the remedy section of this decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Redding, California facility copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. July 17, 2018

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting in part.

Contrary to the judge and my colleagues, I would find that the Respondent's discharge of Denise Whitmire violated Section 8(a)(3) and (1) of the Act.[1]

I.

As detailed by the judge, Whitmire was a housekeeper who came upon a discarded tissue, containing a scribbled note, sitting on a table in the Respondent's lobby. The tissue contained the words "MEEK" and "they took my house, and now they're going to kill me." Whitmire showed the tissue to a nearby group of her fellow employees, including three certified nursing assistants and one housekeeper. The judge found that Whitmire left the conversation with the understanding that the tissue came from a resident who had a habit of writing notes on various materials and that she could discard the tissue, which she did. Neither Whitmire—nor any of the other participants in the conversation—reported the incident to management.

Later that same day, Respondent's Administrator Anne Gilles learned of the tissue from a receptionist and began an investigation. Still the same day, Gilles told a payroll clerk that "she was going to contact corporate to see if this was a reason that she could terminate Denise Whitmire for not showing her the tissue or talking to her about it." The next day, the Respondent suspended Whitmire for failure to report suspected elder abuse and for destroying evidence. Whitmire was discharged days later.

Whitmire had been an open and active union supporter. She was a member of the Union's bargaining committee. She participated in two union picket lines in front of the Respondent's facility. Whitmire also displayed pro-union signs on her car, which were visible to her co-workers, management, and the public. Moreover, the record establishes Gilles particularly disliked Whitmire and her union activities. Among other things, Gilles cautioned an employee against having lunch or taking breaks with Whitmire because she "was part of the Union, and you had to watch what you said around her." Further, in rejecting Whitmire's 2011 bid to become a supervisor, Gilles observed that she could not understand why anybody would apply for a supervisory position when "they caused so many problems at the facility; [and] who would ever consider them for a supervisory position?"

The judge found that the General Counsel carried his initial burden under *Wright Line*[2] of establishing that Whitmire's protected union activity was a motivating factor in her discharge, and no party excepts to that finding. But the judge also found that the Respondent demonstrated that it would have discharged Whitmire even absent her protected union activity, and he consequently dismissed the allegation. My colleagues adopt this latter finding, but substantial evidence does not support it.

II.

Here, as explained, the General Counsel presented a very strong initial case that the Respondent was motivated by Whitmire's union activity in firing her. The strength of this unchallenged showing heightened the burden on the Respondent to rebut it. See, e.g., *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011). The Respondent clearly has failed to carry its burden.

It merits notice that that there is reason to question the Respondent's entire premise for the discipline in question—that the discarded tissue amounted to evidence of elder abuse. In a facility where patients suffered from dementia, it is easy to see why a reasonable employee would not view the tissue's message as a credible suggestion that staff members actually "took [the resident's] house" and were "going to kill [her]." And even if this were a credible interpretation of the tissue's message, showing the tissue to other workers before discarding it (as Whitmire did) hardly suggests that she engaged in an intentional effort to cover up evidence of abuse.

But even giving the Respondent the benefit of every doubt, its rebuttal case is sunk by the particularly strong evidence of Whitmire's disparate treatment. Notably, Whitmire showed the tissue to four other employees. Of that group, only Whitmire was disciplined—and she, of

[1] I join the Board's decision in all other respects.

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

course, was discharged. The only distinction between Whitmire's conduct and that of her coworkers is that Whitmire—*a housekeeper,* whose job it was to throw away trash—discarded the tissue. The Respondent, however, fails to explain why Whitmire's action cost her her job, while her coworkers escaped any discipline at all. If the tissue incident truly raised a concern about possible elder abuse, then surely the Respondent would have taken some action against Whitmire's coworkers for their own failures to report.

Under the circumstances, then, it seems clear that the Respondent's antiunion animus, and only that animus, explains its actions. Accordingly, I would reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) when it suspended and discharged Whitmire.

Dated, Washington, D.C., July 17, 2018

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, dissenting in part.

I join my colleagues in adopting the judge's dismissal of the prediscipline and postdiscipline bargaining allegations and in reversing the judge's dismissal of the temporary suspension of merit increase allegations. I further join Member Kaplan in affirming the judge's dismissal of the allegations regarding the suspension and termination of employee Denise Whitmire. Contrary to my colleagues, however, I agree with the judge that the Respondent did not violate Section 8(a)(3) and (1) of the Act when it discharged employee Anita Rowland. On this issue, I respectfully dissent.

The judge found that the General Counsel met his burden under *Wright Line*[1] to show that Anita Rowland's union activities were a motivating factor in the Respondent's decision to suspend and discharge Rowland. There are no exceptions to that finding. The judge further found, however, that the Respondent demonstrated it would have suspended and discharged Rowland regardless of her union activities. For the following reasons, I agree.

The Respondent maintains a zero-tolerance policy under which any employee suspected of resident abuse "will be suspended during the investigation and ultimately terminated if the investigation confirms willful abuse." On May 24, 2012, Rowland accompanied a resident of the Respondent's nursing home to a doctor's office. This resident suffers from dementia and is prone to frequent, profanity-laced outbursts. While Rowland and the resident were in the doctor's office, the Respondent's director of nursing, Jane Thimmesch, received a phone call from someone who identified herself as Terra Pagnano, the office coordinator at the doctor's office. Pagnano reported that as Rowland and the resident were entering the office, the resident was shouting, and Rowland screamed at her: "If you don't knock it off, I'm going to beat your ass!" Thimmesch questioned Pagnano, then hung up and called the doctor's office back to make sure that Pagnano's call had not been a crank call. During this return call, Pagnano repeated the words she had heard Rowland use, insisted that it was Rowland who had spoken them, and added that two of her coworkers had heard the same thing.

Thimmesch reported the incident to the Respondent's administrator, Anne Gilles, who drove to the doctor's office to investigate in person. By the time Gilles arrived, Pagnano had left for the day, but Gilles questioned Pagnano's two coworkers closely, emphasizing the seriousness of the accusation and that it could cost Rowland her job. Pagnano's coworkers were insistent that it was Rowland and not the resident who uttered the threat because (i) they distinctly heard two voices yelling *at the same time*, (ii) they were familiar with the resident's voice from her previous visits to the office, and (iii) they were certain that the voice that had shouted the threat was not the resident's voice. Gilles returned to the Respondent's facility and suspended Rowland pending further investigation, in keeping with the Respondent's resident-abuse policy.[2]

The following day, Gilles returned to the doctor's office to interview Pagnano and re-interview her two coworkers. Although Gilles reminded them that the resident sometimes yells in different voices, all three insisted that they had heard two voices yelling over each other at the same time, one belonging to Rowland and the other to the resident, and that it was Rowland who uttered the threat. Later that day, several of the Respondent's managers participated in a conference call. They discussed

[1] 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[2] While at the doctor's office, Gilles also attempted to speak with the driver of the van who transported Rowland and the resident to the office. However, the driver was preoccupied with some kind of electronic device, from which he would not look up. Gilles asked the driver if he had heard or seen "anything wrong," and he replied, "I know nothing. Nothing happened." Gilles concluded that the driver either had not been paying attention or did not want to get involved. Further attempts by the Respondent's managers to interview the driver were unsuccessful.

the fact that Rowland had been a good employee who had never before been accused of inappropriate conduct toward a resident. But they had to face the fact that three witnesses, none of whom had any motive to lie about Rowland or get her in trouble, had uniformly and repeatedly insisted that Rowland had shouted a threat of violence at a resident. The managers collectively decided to terminate Rowland's employment. Out of an abundance of caution, the investigation continued postdischarge and included Regional Director of Operations Ken Cess, who interviewed two of the three employees from the doctor's office (the third being unavailable that day). Cess testified that he wanted to satisfy himself that there was no doubt in the minds of these witnesses. He also wanted to make sure that Gilles' investigation had been adequate, given Rowland's high union profile. According to Cess, the witnesses reiterated their previous accounts.

Rowland consistently denied uttering the threat of which she was accused, including at the unfair labor practice hearing, and the judge found her to be "a generally credible witness." The three employees from the doctor's office also testified at the hearing; their testimony was consistent with their reports to Thimmesch, Gilles, and Cess; and the judge found all three "highly credible." Faced with conflicting credible testimony, the judge gave the nod to the three employees from the doctor's office, based on the level of detail in their testimony, the consistency of their accounts, and the fact that they had no reason to wish to injure Rowland or any other "selfish or pecuniary motive" but rather had reported the incident purely out of concern for the resident's welfare. The judge therefore found that Rowland "did in fact scream a threat of physical harm" at the resident.

Having resolved the key issue of fact, the judge turned to the legal issue of whether the Respondent had met its *Wright Line* defense burden, taking several factors into account. First, Rowland's threat constituted elder abuse. Second, the Respondent persuasively established that it regards elder abuse with utmost seriousness. Third, the Respondent does not have a progressive discipline policy, and the judge accepted the Respondent's position that it deemed Rowland's misconduct sufficiently egregious to warrant termination for a first offense. Indeed, Rowland herself, while denying that she had threatened the resident, conceded that such a threat would be grounds for discharge. Fourth, although counsel for the General Counsel attempted to show that Rowland was treated disparately, the record does not evidence disparate treatment. Accordingly, the judge concluded that the Respondent had shown, by a preponderance of the evidence, that it would have discharged Rowland for threatening a resident with physical violence even in the absence of her union activities.

I see no reason to reject the judge's thorough, painstaking analysis. Even if the judge's crediting of both Rowland and the three witnesses from the doctor's office leaves some residual uncertainty whether Rowland did, in fact, utter the threat of which she stands accused, this does not affect the soundness of the judge's findings under *Wright Line*. "[I]n order for an employer to meet its *Wright Line* burden, it does not need to prove that the employee *actually* committed the alleged offense, but [it] must, however, show that it had a *reasonable belief* that the employee committed the offense, and that the employer acted on that belief in taking the adverse employment action against the employee." *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004) (emphasis in original), enfd. 198 Fed.Appx. 752 (10th Cir. 2006). Regardless of whether Rowland actually committed elder abuse, the Respondent reasonably believed that she had done so, and the record clearly supports a finding that it acted on this belief when it suspended and discharged her.

My colleagues find Rowland's discharge unlawful, citing two reasons.

First, they contend that Rowland was treated unfairly in comparison to employee Nancy Antonson. Antonson received a final written warning after a resident complained that she handled the resident roughly, and rolled her eyes and said "you've got to be kidding" when the resident had a bathroom accident. I believe it was reasonable for the Respondent to regard Rowland's misconduct—a threat of physical violence—as more grave than Antonson's, and therefore I disagree that Rowland was treated disparately. Further, the complaint against Antonson came from a single resident, and it appears that the Respondent was unable to corroborate it.[3] I note as well that the Respondent's elderly residents often have cognitive issues. In contrast, there were three neutral, credible witnesses to Rowland's misconduct, and they gave detailed, consistent accounts.

Second, my colleagues cite the fact that the Respondent continued its investigation after Rowland was discharged. Like the judge, I see nothing suspicious in this. Because Rowland had been an exemplary employee, it strikes me as unremarkable that the Respondent's managers would continue to investigate in hopes of uncover-

[3] Contrary to my colleagues, I do not suggest that the Respondent necessarily found that "the accusations against Antonson [were] less credible than those against Rowland." Rather, I simply note the important and conceded point that the accusations against Antonson came from a single, interested source while the accusations against Rowland were from three neutral sources.

ing information that would exonerate her. Moreover, given Rowland's high profile within the Union, the Respondent reasonably anticipated litigation over the discharge and took the precaution of double-checking the investigation and involving higher management in that process. Nothing about the ongoing investigation suggested that the Respondent was uncertain about its discharge decision or was trying to manufacture a defense after the fact.[4]

In sum, I would affirm the judge's dismissal of the allegations concerning Rowland.

Dated, Washington, D.C., July 17, 2018

William J. Emanuel, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting SEIU United Service Workers-West, CTW, CLC.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Angela Rowland full reinstatement to her former jobs or, if that job no longer exist, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Angela Rowland whole for any loss of earnings and other benefits resulting from her suspension and discharge, less any net interim earnings, plus interest, and WE WILL also make such employee whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Angela Rowland, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the suspension and discharge will not be used against her in any way.

WE WILL compensate Angela Rowland for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, to the extent we have not already done so, make you whole for any loss of earnings or other benefits resulting from our unlawful suspension of our merit raise program from June 1, 2011, until August 1, 2012, in accordance with the settlement reached with the Union in the 2012 collective-bargaining agreement.

WINDSOR REDDING CARE CENTER, LLC

The Board's decision can be found at https://www.nlrb.gov/case/20-CA-070465 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[4] My colleagues "cf." cite *Lowery Trucking Co.*, 200 NLRB 672 (1972), a case that long predated *Wright Line* and thus did not apply its burden-shifting dual-motive analysis. In addition to being dated, *Lowery Trucking* is inapt. There, employee Holmes was discharged after being involved in a collision and commenting on that accident during a mid-morning coffeebreak. Multiple witnesses were present during the coffee break, but the employer hastily discharged Holmes based on a single account of what Holmes allegedly said—and then interviewed other witnesses afterwards. In addition, the owner of the company vacillated as to the reason for the discharge. On these facts, the Board reasonably found that the continuation of the investigation after the discharge suggested that the employer was unsure of its grounds. Id. at 677. Here, by contrast, the Respondent's pre-discharge investigation was thorough, the Respondent's managers deliberated carefully before deciding to discharge Rowland, there was no vacillation as to the reason for Rowland's discharge, and no new witnesses were interviewed during the post-discharge investigation.

Sara McBride, Esq. and *Elvira Pereda, Esq.,* for the Acting General Counsel.
John B. Golper, Esq., and Omar Yousef Shehabi, Esq., Glendale, CA, for the Respondent.
Manuel A. Boigues, Esq., Alameda, California, for the Union.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Redding, California, on August 21 through 24, 2012. This case was tried following the issuance of an order consolidating cases, amended consolidated complaint and notice of hearing (the complaint) by the Regional Director for Region 20 of the National Labor Relations Board (the Board) on July 20, 2012. The complaint was based on a number of original and amended unfair labor practice charges, as captioned above, filed by SEIU United Service Workers-West, CTW, CLC (the Union or the Charging Party). It alleges that Windsor Redding Care Center, LLC (the Respondent, the Employer, or Windsor Redding), has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.[1]

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the Acting General Counsel, counsel for the Union,[2] and counsel for the Respondent, and my observation of the demeanor of the witnesses,[3] I now make the following findings of fact and conclusions of law.

[1] All pleadings reflect the complaint and answer as those documents were finally amended at the hearing. The General Counsel's formal documents (GC Exh. 1.) contain the charges, amended charges, and affidavits of service establishing the dates upon which those charges were filed with the Board and served on the Respondent, as alleged in the complaint.

[2] While counsel for the Union did not file an independent brief, he incorporated by reference and adopted as his own the brief filed by counsel for the Acting General Counsel.

[3] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the Respondent's answer admits, and I find that at all times material herein, the Respondent has been a corporation, with an office and place of business located in Redding California (the Redding facility), where it has been engaged in the business of providing long-term health care and rehabilitation services. Further, I find that during the 12-month period ending April 13, 2012, the Respondent, in conducting its business operations just described, derived gross revenues in excess of $100,000; and during the same period of time, purchased and received at its Redding facility goods valued in excess of $5000, which goods originated from points outside the State of California.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the Respondent's answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Dispute

Counsel for the Acting General Counsel alleges that the Respondent suspended and then discharged employees Denise Whitmire (Whitmire) and Angela Rowland (Rowland) because of their union membership and union activities in violation of Section 8(a)(3) and (1) of the Act. The Respondent denies this contention, and alleges that it suspended and subsequently discharged Whitmire and Rowland for violating State and Federal law and Windsor Redding policy regarding elder abuse. Specifically, the Respondent contents that Whitmire failed to report suspected elder abuse and then destroyed physical evidence of that abuse, which also had a direct impact on a resident's medical care. According to the Respondent, months later and in a totally separate incident, Rowland was suspended and then terminated for verbally threatening a resident at a doctor's office, thereby committing elder abuse. However, the General Counsel contends that the Respondent's stated reasons for suspending and terminating Whitmire and Rowland were nothing more than a pretext designed to conceal its true motive, namely because those employees supported the Union.

Further, the Acting General Counsel alleges that the Respondent has failed and refused to bargain with the Union regarding the decisions to suspend and terminate Whitmire and Rowland and over the effects of those decisions, in violation of Section 8(a)(5) and (1) of the Act. The Respondent denies that any such legal obligation exists, and, further, that in any event, assuming such a requirement exists, it did provide the Union with an opportunity to bargain, of which opportunity the Union failed to take advantage.

Finally, the complaint charges that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing

an alleged past practice of granting wage increases to employees commensurate with their annual performance evaluations on or near the anniversary of their respective date of hire. The Respondent contends that there was no such past practice, and, even assuming there existed such a past practice, that the Respondent has made no changes in that practice. In the alternative, the Respondent argues that if there is a violation of the Act, it is "technical" in nature, and has been cured by the Respondent's subsequent action in granting retroactive wage increases to the impacted employees.

B. The Facts

Windsor Redding is a skilled nursing facility located in Redding, California. It is operated at the management level by SNF Management and at the facility level by Windsor Health Care, which manages other skilled nursing facilities under the Windsor name. Ken Cess, the regional director of operations for SNF, described Windsor Health Care and SNF as "parallel companies," owned by the same principals. The Windsor Redding facility has approximately 80 patients, with 109 employees working at the facility. Of that number, around 80 are employed as service and maintenance employees, and another approximately 15 employees work as licensed vocational nurses.

On January 21, 2011, the Union was certified as the exclusive collective-bargaining representative of the Respondent's service and maintenance employees in a unit described as follows: "All full-time and regular part-time Certified Nursing Assistants, Restorative Nursing Assistants, Dietary Aides, Cooks, Housekeepers, Laundry Aides, Activities Assistants, Social Services Employees, Medical Records Employees, Receptionists and Admissions Coordinators employed by the Employer at its 2490 Court Street, Redding, California facility; excluding all other employees . . . guards and supervisors as defined by the Act."

On January 21, 2011, the Union was certified as the exclusive collective-bargaining representative of the Respondent's licensed vocational nurse employees in a unit described as follows: "All full-time and regular part-time Licensed Vocational Nurses; excluding all other employees, office clerical employees, guards, managers, and supervisors as defined in the Act."

The parties agree and I find that the service and maintenance employees' unit and the licensed vocational nurses' unit, which are described above, are both units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Further, the parties agree and I find that since January 21, 2011, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the employees in the service and maintenance unit and of the employees in the licensed vocational nurse unit, which units are both described above.

Jim Philliou, the Union's nursing home contracts negotiator, testified that he was the lead union negotiator during the Windsor Redding contract negotiations. According to Philliou, the parties started bargaining in February of 2011, and after 18 months of negotiation, with approximately 20 bargaining sessions, they finally reached agreement on the terms of a first contract. A "tentative agreement" was signed on August 7, 2012, with an expiration date of August 6, 2013. Ken Cess testified, during cross-examination by counsel for the General Counsel, that of the six Windsor Health Care facilities, three are union represented facilities, of which only Windsor Redding was organized after it was acquired.[4]

A considerable period of time during the hearing was devoted to the Respondent's position that Whitmire and Rowland were terminated for violating both Federal and State law, as well as the Respondent's policies, regarding elder abuse. In that regard, counsel for the Respondent was afforded an opportunity to offer witness testimony and documentary evidence as to the specific laws and policies that applied to elder abuse. Having received this evidence, I have no doubt that skilled nursing homes, including the Respondent, must be very vigilant in training staff to identify, report, and prevent elder abuse. During the hearing, counsel for the Acting General Counsel indicated her understanding of these laws and requirements, and did not dispute or challenge the importance of the Respondent's efforts to ensure that such abuse did not occur, and that staff was adequately trained to prevent and report any such abuse.[5]

Counsel for the Respondent stresses that under California law, a nursing home must report known or suspected instances of elder or dependent adult abuse.[6] Failure to do so is a crime. Further, all employees who work in long-term care facilities, including support and maintenance staff, are "mandated reporters." A mandated reporter is required to report known or suspected abuse if he or she has observed or has knowledge of the incident; has been told by an elder or dependent adult that he or she has experienced abuse; or reasonably suspects that abuse has occurred. Mandated reporters must follow specific requirements for reporting known or suspected cases of abuse to the proper authorities. A mandated reporter's duty to report suspected abuse is an individual duty. It is the mandated reporter's responsibility to report suspected abuse to the proper state or local authority, separate and apart from the reporting obligation of his or her employer. Also, to ensure that suspected elder abuse is recognized and reported, both California and Federal laws require residential care facilities to provide training and continuous education to all staff.

Windsor Redding maintains an Abuse Prevention and Procedure Manual. That Manual advises employees that the Respondent has a "Zero Tolerance for Abuse," and sets forth in detail the mandatory reporting requirements for suspected resi-

[4] While counsel for the General Counsel has suggested through her questions to various witnesses that the negotiations between the Union and the Respondent were very difficult and time consuming, it should be noted that as of the date of this hearing, there has been no charge filed with the Agency alleging surface bargaining on the part of the Respondent.

[5] As there is no dispute that Federal and State laws prohibit elder abuse and mandate certain action on the part of a nursing home and its employees, this decision will not contain specific citations to those laws.

[6] Federal law also mandates that certain individuals in long-term care facilities report any '"reasonable suspicion' of crimes committed against a resident of that facility."

dent abuse. (R. Exh. 18.) The Respondent's policy states that any employee "suspected of alleged abuse will be suspended during the investigation and ultimately terminated if the investigation confirms willful abuse." (R. Exh. 20.) In addition to the legal duty to report suspected abuse to the state, the Respondent's employees also must report suspected abuse directly to Anne Gilles, the Respondent's abuse prevention coordinator, or in her absence to the director of nursing or the nurse supervisor on duty. (R. Exh. 18.) Employees are advised of the location of the Abuse Manual, and that they may review the resident abuse policies at any time.

The Respondent provides initial training for new employees, as well as training twice a year for all employees to inform them of their legal duties as mandated reporters of suspected resident abuse. During these training sessions, the Respondent shows employees a video, produced and distributed by the State of California, entitled, "Your Legal Duty . . . Reporting Elder and Dependent Adult Abuse." (R. Exh. 14.)[7] This video is intended to educate the staffs of nursing homes regarding different types of patient abuse, how to recognize abuse, the procedure for reporting suspected abuse, and the consequences for failing to do so. Gilles, who is also the Respondent's Administrator, testified that at those times when the Respondent showed the video to the staff, a trainer would conduct question and answer sessions to ensure that the employees understood their duties and responsibilities to prevent and report abuse. At these training sessions, employees are given a copy of the legally mandated reporting requirements, which they sign as evidence of receipt. Both employees Denise Whitmire and Angela Rowland have signed such a receipt. (R. Exh. 1–2.)

The Respondent employed Denise Whitmire as a housekeeper from January 2010, until her termination on February 21, 2012.[8] Whitmire was an active union supporter. She was a member of the union bargaining committee and attended bargaining sessions with management once or twice a month for approximately 18 months. Whitmire testified that during this period of time, she frequently updated her coworkers during breaks in the lunchroom or while smoking on the patio regarding the progress being made at the negotiations. Additionally, while the first contract was being negotiated, Whitmire participated in two Union picket lines in front of the Respondent's facility and maintained prounion signs on her personal car, which was parked in the facility parking lot where it was visible to both employees and management.

There is no question that Whitmire's union activities were significant and were well known to the Respondent's managers and administrators, including the principal administrator, Anne Gilles. Further, it is clear from the record that Gilles did not like Whitmire. According to Denise Henschel, a former payroll clerk, Gilles told her that she should not be having lunch or taking smoking breaks with Whitmire as Whitmire "was part of the Union, and you had to watch what you said around her." Further, when Whitmire applied for and interviewed for a housekeeping supervisor position in October 2011, Gilles commented to Henschel that she could not understand why anybody would apply for a supervisory position when "they caused so many problems at the facility; [and] who would ever consider them for a supervisory position." This comment was apparently in reference to Whitmire, who ultimately was denied the supervisory position. Supporting this contention was the testimony of Certified Nursing Assistant Frances Marley who testified that around Thanksgiving of last year, she overheard Gilles tell the "medical records lady" that "she hated Denise Whitmire because [Whitmire's] got a big mouth."

On February 14, 2012, Whitmire arrived at work at approximately 4:40 a.m. She learned from a fellow employee that a transient was found under the desk in the lobby the night before, and subsequently removed by the police. Whitmire clocked in and began her work shift shortly thereafter, starting her duties in the lobby. The lobby is accessible to all employees and residents 24 hours a day. On a table she noticed a Kleenex, which, according to Whitmire, had been scribbled on in pencil. When testifying she initially described the writing as scribble, largely nonsensical, resembling a "crossword puzzle," with writing going in all directions, like "chicken scratch," and was nearly impossible to read. However, she testified that she could make out the block letters "MEEK," but did not recognize those letters as spelling the name of a resident. (Hereinafter referred to as "Resident A.")[9] Also, somewhat later Whitmire testified that the writing on the Kleenex said, "They took my house, and now they're going to kill me."

Whitmire insisted that the scribbled-on Kleenex did not resemble a note or a letter in any way. She testified that a number of employees were in the lobby and she showed them the KleenExh. Those employees included certified nursing assistants (CNAs) Ron Rich and Frances Marley, plus at least one other CNA, and housekeeper Susan Lees. Whitmire asked the employees what they thought of the KleenExh. She testified that Ron Rich said it looked like "trash," and that at least on other employee, who she could not identify said, "She does this all the time." Further, Whitmire contends that Susan Lees could not read the Kleenex, as she did not have her reading glasses with her. Convinced that the Kleenex was trash, Whitmire testified that she threw it away.

Rich testified that when shown the Kleenex, he could read the writing and could also read Resident A's name, and recognized her as one of the residents that he cared for. Further, he testified that the resident had been admitted to the home approximately 1 month earlier, and that she "scribbled on everything in her room," including bedspreads. According to Rich, he never reported this behavior to anyone. Further, he did not testify that he described the Kleenex to Whitmire as trash, nor did he suggest that she throw it away.

[7] During the hearing, this video was played on the record with the audio portions of the video being recorded, and with the visual portions of the video being commented on by counsel for the Respondent and by me.

[8] All dates refer to 2012 unless otherwise indicated.

[9] In an effort to protect the confidentiality of the two residents of the nursing home involved in this proceeding, the witnesses were instructed to refer to them as "Resident A" and "Resident B." The first resident being the one involved in Whitmire's situation, and the second resident being the one involved in Rowland's situation. However, in some instances the witnesses forgot and referred to the residents by their actual last names.

Frances Marley testified that the writing on the Kleenex looked like "chicken scratch," however; Whitmire was able to read it, and, in fact, read it to Marley. According to Marley, there was another CNA present, Dawn Mraz. Marley testified that Mraz said that the resident "does this all the time and has been care planned." Supposedly, Mraz said that as the conduct was care planned, it did not need to be further reported. According to Marley, she herself said that if the resident's conduct had been "care planned," to throw the Kleenex away. However, later in her testimony she appeared to contradict herself, saying that she told Whitmire to take the Kleenex and report it to management by showing it to the "Charge Nurse" in Wing 2.

It should be noted that according to the credible record evidence, "Resident A" had only been living at the facility for about a week when the incident in question occurred. Further, the term "care plan" refers to the clinical diagnoses for an individual resident, his/her symptoms and behavioral issues, plus the planned course of treatment for that resident. The record also established that CNAs can not add or eliminate anything from a resident's care plan, but only Registered Nurses (RNs) and Physicians can do so. Also, the credible record evidence established that the CNAs do not supervise the housekeeping staff, but do typically give them basic instructions such as pointing out when trash containers need to be emptied.

As will be noted throughout this decision, there a number of reasons why I do not find Denise Whitmire to be a credible witness. In this instance, I find her testimony regarding her finding of the Kleenex/note and then discarding it to be, at the least, disingenuous. Clearly, this was a note from a resident, although written on a KleenExh. Whitmire recognized it as such and was able to read its contents, despite her initial testimony to the contrary. Certainly, by the time she showed it to other employees who were coming into the lobby, she had become aware of the specific resident involved, the precise substance of the note, and the fact that this resident had a habit of writing notes on various materials. Her attempt to portray her subsequent actions in not reporting the note to management and in throwing away the Kleenex as following the directions given to her by certain CNAs is inaccurate at best. There is no credible record evidence that she is supervised by the CNAs, but, rather, evidence that she is supervised by the housekeeping supervisor. Her decision to discard the note was simply based on Whitmire's conclusion that it was trash, not worth saving or bringing to the attention of management.

Further, I conclude that under Federal and State law, as well as pursuant to the Respondent's internal policy, finding such a note required that Whitmire, as a mandated reporter, at a minimum, furnish the Kleenex to management, so that a proper notice could be filled with the local authorities.[10] There is simply no credible evidence that finding a note where Resident A asserts that someone has taken her home and intends to kill her can be disregarded as something other than suspected elder abuse, merely because a care plan allegedly refers to similar past conduct by the resident. It is apparent to me that Whitmire exercised very poor judgment in failing to follow the required procedures in reporting suspected elder abuse, and, further, in destroying the physical evidence by discarding the note.[11] Certainly, she had received training that should have caused her to act differently.

Gilles arrived at work several hours after Whitmire had discarded the Kleenex, and she learned of the incident from the receptionist, Tootie Oberg. Gilles was concerned about the note and asked Housekeeping /Maintenance Supervisor Clayton Campbell, Whitmire's direct supervisor, to obtain more information. Campbell questioned Whitmire about the incident, and she told him that the Kleenex contained the name of a resident and that it said, "They took my house and now they're going to kill me." He asked what she did with the note, and Whitmire replied that she had thrown it away. Campbell told Whitmire not to throw away a note like that in the future, but to show it to her supervisor.

Campbell reported his conversation to Gilles who continued to look into the matter. Oberg had told Gilles that she had heard that Whitmire had shown the note to Ron Rich, Fran Marley, and Susan Lees. According to Gilles, she met with Rich that day and asked him about the incident. Gilles testified that Rich was hesitant to talk with her, indicating that he did not want to get involved, and specifically saying, "I didn't talk to her. I don't want to get into it. I don't want to get into her stuff." He did not indicate that he knew what the note said or who the patient was who wrote it. However, Rich's account is somewhat different. He testified that about 9 a.m. he was approached by Gilles, who asked him if he would be willing to talk with Yolanda Thomas from Human Resources about the incident, which he agreed to do.[12] Interestingly, he denies that Gilles actually spoke with him about the incident on that same day. Obviously, this makes no sense. In order to ask Rich if he was willing to talk with Thomas about the incident, Gilles would need to broach the subject with him. Therefore, I credit Gilles' version of her conversation with Rich on February 14.

Gilles testified that she did not speak with Fran Marley on that day, as Marley worked the midnight shift and was gone by the time Gilles arrived at work. In any event, Gilles testified that she did speak with Whitmire about the note that same day. According to Gilles, Whitmire admitted that she found "a scratchy note on a piece of tissue," with Resident A's name on it, described the contents of the note, and said that she "put it in the dumpster," because she "thought it was trash." Gilles suggested looking for the note, but by that time the trash had been removed from the facility. Gilles ended the conversation by admonishing Whitmire that she had created a problem, and that she should have reported finding the note. However, Whitmire denies having a conversation with Gilles about the note until

[10] Under California state law, not only should Resident A's note have been turned over to the California State Agency responsible for investigating suspected elder abuse, by also to the Office of the State Ombudsman, which acts as the personal advocate on behalf of the resident.

[11] When Gilles ultimately learned of the existence of the note, several hours later, the day's rubbish had already been picked up by the trash collectors, and, thus, the note became irretrievable.

[12] All that Rich recalls of his conversation with Thomas on February 14 was that she asked him what he would have done with the tissue had he found it, to which he replied that he would have done nothing with it, as he didn't believe it constituted suspected elder abuse.

the following day. I do not find this denial credible. Gilles was obviously upset about the note being discarded. She sent Clayton Campbell to speak with Whitmire, spoke with Rich herself, and asked him to talk with Yolanda Thomas from Human Resources. It is simply logically that she would have been in a hurry to talk personally with Whitmire, and, so, I credit Gilles that this conversation with Whitmire did occur on February 14.

That same day Gilles spoke with housekeeper Susan Lees to find out what she knew of the incident. Lees reported that she had seen Whitmire, Rich, and Marley looking at a note, but because she did not have her glasses with her at the time, Lees could not actually read the note. Further, Lees told Gilles that Whitmire had read the contents of the note to her, and that she understood that Whitmire had thrown the note away.

Gilles testified that after meeting the witnesses to the incident, she called her boss, Ken Cess, the Regional Director of Operation for SNF, and Human Resource Manager Yolanda Thomas to discuss the incident with them. Thomas indicated that she would come to the facility the following day to meet with Whitmire. In the meantime, Gilles reviewed Resident A's chart and spoke with her nurse to determine what kinds of medical problems she had. According to Gilles, she discovered that Resident A was new to the facility, having only been admitted about 8 days earlier. Further, she met with the Respondent's director of nursing and advised her of the note and directed her to discuss the resident's claims, as reflected on the note, with the patient's physician.

Based on her investigation, Gilles determined that the facility had an obligation to report what she considered to be suspected patient abuse. Accordingly, she faxed a report to the State of California, Health and Human Services Department. (R. Exh. 24.) Gilles also contacted the local police department by phone to notify them of the incident, and faxed a report to Joanne Montgomery, the facility's Ombudsman. (R. Exh. 25.)

The following day, February 15, Gilles and Thomas meet with Whitmire and her union representative, Angela Rowland. The meeting began with Whitmire explaining how she found the note, what it looked like, and that she threw it out thinking that it was trash. Whitmire indicated that she never suspected abuse when she found the Kleenex since she had been told by one of the CNAs that Resident A did this all the time. Gilles responded by reminding Whitmire that she was a "mandated reporter," and should have reported the incident and turned in the note. Apparently a decision had been made prior to the meeting to suspend Whitmire, as she was presented with a prepared "Correction Action Memo." (GC Exh. 2.) The document stated that Whitmire was being suspended for a "Failure to report suspected abuse," and for "Throw[ing] away evidence." Whitmire took the opportunity to write in the employee statement section of the memo, "Note was on Kleenex, aids told me she does this all the time, so I didn't take it seriously. Sorry, Denise Whitmire."

Denise Henschel, the Respondent's payroll clerk, testified that in the late afternoon of February 14, the day before Whitmire's suspension, Gilles directed Henschel to prepare Whitmire's final check. According to Henschel, earlier that day Gilles had told Henschel that she intended to contact the Respondent's corporate office to ask whether she could fire Whitmire over the Kleenex incident. It was Henshel's testimony that Gilles' practice when she intended to terminate an employee was to order the final check, suspend that person, and when the check arrived to terminate that person's employment. Counsel for the General Counsel contends that Gilles' action in ordering Whitmire's final pay check shows that she had made up her mind to terminate Whitmire as early as the afternoon of February 14.

Gilles testified that she decided to terminate Whitmire because as a "mandated reporter" she should have reported the note, and her mistake was compounded by throwing away the evidence of the suspected elder abuse. Ken Cess testified that he approved the decision to fire Whitmire after discussing the situation with both Gilles and Yolanda Thomas. In fact, he indicated that he made the ultimate decision to terminate Whitmire.

On February 21 Gilles met with Whitmire and her union representative, Angela Rowland. Also present was Henschel. The meeting was short, with Whitmire not being given any further opportunity to defend her actions. Gilles informed Whitmire that she was being terminated and handed her a notice of termination. That notice reflected that corrective action in the form of termination was being taken because Whitmire "did not report suspected abuse to state, ombudsman or facility," and she "destroyed the evidence without showing [it] to state, ombudsman, or administrator." (GC Exh. 3.)

It should be noted that the State of California, Department of Public Health (DPH) investigated the incident report of suspected elder abuse submitted by Gilles. The state ultimately concluded that there were no deficiencies in the Respondent's reporting procedures, as the Respondent, through Gilles' action, had promptly reported Resident A's note. There was no finding concerning any inaction on the part of Whitmire. (GC Exh. 23.)[13] Further, it should be mentioned that even following Whitmire's termination, she remained on the union bargaining committee, without any protest on the part of the Respondent.

Angelia Rowland was employed by the Respondent for 11-1/2 years. She initially worked as a housekeeper before receiving her license as a certified nursing assistant (CNA) 9 years ago, and then worked as a restorative nursing assistant (RNA) for the last 2 years of her employment. As a RNA, Rowland was responsible for the care of residents, as well as administering restorative physical therapy treatments. There is no dispute that Rowland was an excellent employee. Her work was superior, and she was well liked by management, staff, residents, and their families. Gilles testified as much during the hearing.

Rowland was an active member of the Union during the initial organizing drive and throughout bargaining of the first contract. She collected signatures prior to the representation election, passed out union literature, pens, and stickers to coworkers during the organizing drive, and furnished union information to coworkers during the union campaign and on progress at the barging sessions. She participated in two picketing events at the Respondent's facility, and was the only employee featured on the local television news as a spokesperson for the

[13] The DPH agent also served as an employee of the Centers for Medicare and Medicaid Services (CMS), a Federal agency.

Union. Her car, parked near the Respondent's facility, was used to display prounion signs. Rowland was one of the five employee members of the union negotiating committee. In that capacity, she attended bargaining sessions once or twice a month for approximately 18 months. She and Ron Rich were the two shop stewards at the facility. As such, she attended disciplinary meetings with employees, including those disciplinary meetings involving Denise Whitmire's suspension and termination. Further, there is no question that the Respondent's management was well aware of Rowland's extensive union support and activities.

As a RNA, one of Rowland's duties was to accompany residents to doctors' appointments outside the facility. On May 24, Rowland accompanied Resident B[14] to a doctor's office. Lewis Johnson, employed by Merit MediTrans, was the van driver assigned to dive the resident and Rowland to the doctor's office. Resident B is confined to a wheelchair. She is a very difficult patient, suffering from dementia and prone to frequent, sometimes near constant, outbursts of yelling, screaming, and threatening, accompanied by the use of profanity. Sometimes those outbursts also include threats of bodily harm. Resident B was well known to Rowland, who frequently cared for her.

Rowland testified that on this occasion, Resident B was particularly upset and agitated, apparently brought on by being moved into and out of the van, and because of the very windy conditions outside. The resident began her outbursts as she was placed into the van and continued yelling throughout the short trip to the doctor's office and into the lobby/waiting room of that office. She yelled "Knock it off," and "Shut up," and similar comments, interspersed with profanities. Rowland testified that regarding the profane comments, she could not recall specifically what the resident yelled, as she was so used to hearing such comments that she no longer paid much attention to them. According to Rowland, during the trip she attempted to comfort the resident, saying the resident's name and calmly repeating, "It's okay; it's okay." However, as they entered the lobby of the office, Resident B's outbursts became more extreme with yelling and profanity. Rowland positioned the resident in the waiting room and sat next to her. Shortly thereafter the driver left the office, returning approximately 45 minutes later to pick up Rowland and Resident B and return them to the nursing home.

Seated in the lobby at a reception desk were two medical assistants. Behind them in a separate office was an additional medical assistant. However, from where Rowland was sitting she could not see any of these medical assistants. At no point during the time that she was at the doctor's office did a member of the doctor's staff speak with Rowland about her behavior towards Resident B, or about Resident B's behavior. While waiting to be called for the appointment, Resident B's daughter appeared on the scene. She waited with her mother and Rowland and never said anything to Rowland about Rowland's conduct towards her mother. Similarly, the van driver said nothing about Rowland's conduct.

A few minutes after the daughter arrived, they were called into the exam room, where both Rowland and Resident B's daughter accompanied the resident. Following the appointment, Rowland accompanied Resident B in the van back to the nursing home with Johnson driving. During the ride back, the resident continued her profane outbursts. Once back at the facility, Rowland took Resident B to her room and got her settled in.

However, unbeknownst to Rowland, while she was in the doctor's office, the Respondent's director of nursing, Jane Thimmesch, received a phone call from Terra Pagnano, a biller/office coordinator at the doctor's office complaining about Rowland's conduct. Pagnano reported that as Rowland and Resident B were entering the doctor's office, Resident B was yelling and Rowland screamed, "If you don't knock it off, I am going to beat your ass."

Thimmesch questioned Pagnano as to what she heard to make sure she was certain that it was Rowland who had made the threat. Pagnano confirmed that the speaker was Rowland. Thimmesch testified that she was shocked that a nurse would say such a thing to a patient, and to ensure that it was not a crank call, she called Pagnano back at the doctor's office during which call Pagnano repeated the words spoken by Rowland to Resident B. Thimmesch even asked Pagnano if the words might have been spoken by Resident B, but Pagnano insisted that the speaker was Rowland. Also, Pagnano informed Thimmesch that two of her coworkers at the doctor's office had also heard Rowland threaten Resident B.

Concerned that Rowland had committed elder abuse towards Resident B, Thimmesch immediately brought the news to Anne Gilles. Gilles testified that she was stunned, particularly because she knew that Rowland was a good employee who had never previously been accused of such conduct. Gilles considered the accusation so serious that she immediately drove the short distance to the doctor's office to investigate the claim. She arrived while Rowland, Resident B and her daughter were in the examination room. While at the office Gilles and Rowland did not see each other.

When Gilles arrived at the doctor's office Pagnano had left work for the day, but the other two medical assistants who had heard the threat were still present. Those two employees, Erica Catona and Lindsay Murphy, sat at the reception desk, while Pagnano worked in an office behind the desk. Gilles questioned both Catona and Murphy as to what they heard. Both women informed Gilles that they heard Rowland scream at Resident B in a rude manner, "If you don't knock if off, I'm going to beat your ass." They both admitted that they did not actually see Rowland make the threat, but only heard it. However, they insisted that it was Rowland who had made the threat because they heard two distinct voices yelling at the same time. They claimed to be familiar with Resident B's voice, having heard it on previous office visits, and were sure that she had not said the words in question. Catona and Murphy indicated that they, along with Pagnano, had discussed the incident among themselves before speaking with Gilles, as they were so shocked by what they heard. Gilles stressed the seriousness of the accusation, telling the two women that it could mean Rowland's "certification, her livelihood." She asked them if they

[14] As noted earlier, in an effort to maintain patient confidentiality, the particular resident involved in this incident is referred to as "Resident B."

were "really, really sure." Further, Gilles indicated that she might have to terminate Rowland, in which event they would not see her again. Still, both Catona and Murphy insisted that were certain about what they heard, and that it was Rowland who said it.[15]

While still at the doctor's office, Gilles attempt to speak with the van driver, Lewis Johnson, who had returned to the office in anticipation of picking up Resident B and Rowland and driving them back to the nursing home. Gilles testified that when she approached him, that Johnson had his hat pulled down low and was preoccupied playing with some kind of an electrical device. He acknowledged that he was the van driver and gave Gilles his name, but never looked up from his electrical device. Gilles asked Johnson if he had heard or saw "anything wrong" when bringing Resident B into the office. According to Gilles, Johnson replied, "I know nothing. Nothing happened."[16] She testified that based on way Johnson acted and the brevity of his answer, she assumed that he either had not been paying attention to the interaction between Rowland and Resident B, or else did not want to get involved.

It is necessary to consider the credibility of the three medical assistants and of the van driver, all of whom testified during the trial. I found medical assistants Catona, Murphy, and Pagnano all to be highly credible. Their testimony at trial was consistent with that of Gilles and Thimmesch regarding what the medical assistants said on May 24, the date of the incident in question. Further, the three medical assistants all testified in a calm, matter of fact manner, with no indication that they were exaggerating or embellishing their testimony, and without any undue emotion, or indication that they were in any way personally interested in the outcome of the proceeding. Of utmost importance, there was no evidence offered to suggest that they were in any way prejudiced against Rowland, and no reason was offered as to why they might want to harm her. Therefore, I am convinced that correctly or not, Catona, Murphy, and Pagnano all genuinely believed that they heard Rowland scream at Resident B, "If you don't knock it off, I'm going to beat your ass."

However, I am much less convinced of the credibility of the van driver. Johnson essentially agreed with Gilles' testimony, and indicated that in response to her questions he had told her that he did not see anything and that nothing happened. Clearly their conversation at the doctor's office was very brief, and Johnson's answer to Gilles' questions was rather curt, and he seemed to display disinterest. As will be discussed below, this disinterest continued in coming days as several unsuccessful attempts were made by the Respondent's managers to further interview Johnson. Interestingly, this disinterest seemed to change during his testimony at the trial when Johnson, responding to a question from counsel for the General Counsel as to whether he had heard Rowland make the threat in question, responded, "Absolutely not." This response seemed to me to be somewhat disingenuous when compared to his previous comments on the matter. All in all, I put much less reliance on Johnson's recollection of the events in the doctor's office than I do of the three medical assistants, especially in light of the fact that Johnson was gone from the office for approximately 45 minutes, during which time Catona, Murphy, and Pagnano remained.

Following her conversations with Catona, Murphy, and Johnson, Gilles returned to the Respondent's facility. She asked Thimmesch to send Rowland to her office when she returned from transporting Resident B. Shortly thereafter, Rowland and her union representative, Ron Rich, met with Gilles, Thimmesch, and Brett Funk, a Registered Nurse (RN) and Rowland's supervisor. Gilles informed Rowland that the Respondent had received a complaint from the doctor's office that Rowland had threatened Resident B, and that the three medical assistants present in the office when Rowland and Resident B arrived were all saying the same thing. Rowland denied making any threat, but could offer no explanation as to why the medical assistants would say such a thing. Gilles asked Rowland to think about what had transpired in the doctor's office and whether something that she said might have been misinterpreted by the witnesses. Further, Gilles advised Rowland that she was being suspended for alleged verbal elder abuse pending the outcome of an investigation. Gilles gave Rowland a Corrective Action Memo to this effect, upon which Rowland wrote, "I did not say or do anything out of line to [Resident B]. The Merit driver was w/us while entering & leaving the building." (GC Exh. 9.)

Gilles and Thimmesch were aware of the difficult nature of Resident B and the fact that she frequently screamed various threats and profanities towards the nursing home staff and others. Further, they knew that Rowland was a good employee with no disciplinary record. Accordingly, the next day, May 25, Gilles continued with her investigation, returning to the doctor's office where she interviewed Pagnano for the first time and Catona and Murphy for the second time. She again emphasized the seriousness of the allegation, mentioned to them that Resident B sometimes screams in different tones, and asked if they were still sure that Rowland had made the threat in question. All three medical assistants continued to insist that they heard two voices, one from Resident B and one from Rowland yelling over each other at the same time, and that it was Rowland who made the threat. Each witness then prepared a written statement as to what had transpired, which written statements were consistent with the oral statements they had previously given to Gilles and Thimmesch. (R. Exh. 27–29.)

That same day, Rowland returned to the facility with the intention of having Gilles sign a paper stating that she was not at work because of her suspension, apparently concerned that she might be considered absent without cause. In any event, she asked CNA Alice Martinez to accompany her to Gilles' office. Gilles signed the paper as requested by Rowland, and then she mentioned that both Resident B's husband and daughter had told her that they were happy with the treatment that Rowland had given to their wife/mother, had no complaints about Rowland, and, in fact, said that the alleged threat sounded to them

[15] Following their interview by Gilles, both Catona and Murphy prepared separate written "Telephone Encounters," which they placed in Resident B's file, memorializing their conversations with Gilles and reiterating the threat they heard Rowland make to Resident B. (R. Exhs. 31, 32.)

[16] Subsequently, Gilles prepared a written note of her conversation with Johnson. (R. Exh. 26.)

like something Resident B would say. Somehow, the conversation turned to the public's perception of nursing homes, at which point, according to Rowland and Martinez, Gilles brought up the subject of signs posted on employees' cars. This was an apparent reference to the ongoing contract dispute between the Union and the Respondent, and those signs employees posted on their cars near the facility intended to pressure the Respondent into signing a first collective-bargaining agreement. Both Rowland and Martinez testified that Gilles indicated it was wrong for such signs to mention patient care, as those comments would give the public a bad perception of the nursing care at the facility, but, rather, that the message on the signs should deal with the issue of the contract dispute and the Union's efforts to obtain a fair agreement. According to Martinez, she responded by saying that they had come to see Gilles not to talk about the Union, but, rather, about Rowland's job. Martinez testified that Gilles' response was simply, "Oh no. This is about the Union. This is all about the Union." At that point the meeting ended.

Gilles denied at the trial that there was any mention during the meeting of May 24 about signs on employees' cars. She testified that the only time she could recall such a subject being discussed was later that same day, during a staff meeting, when she had requested that signs on employee cars not reference "poor patient care," because such language contributes to the public's negative perception about nursing homes. In the alternative, she suggested language on the signs such as, "Windsor Contract Now," or "Anne Gilles Stinks."

In any event, I do not credit Gilles' denial that signs on employees' cars supporting the Union were discussed with Martinez and Rowland. Both CNAs testified regarding this allegation, thus, supporting each other. Their testimony was offered in a realistic and believable way. It was inherently consistent, sufficiently detailed, and had "the ring of authenticity" to it. On the other hand, Gilles' denial seemed hollow, and her attempt to transfer the conversation to a later time when she was not discussing Rowland's situation seemed highly implausible and artificial. Further, had such a staff meeting discussion ensued, other employees should have been available to so testify, yet the Respondent called no such witnesses. Accordingly, I am of the view that during her meeting with Rowland and Martinez where Rowland's suspension was discussed, Gilles did mention her displeasure with certain prounion signs in employees' cars. This discussion would, therefore, include Gilles' reference to the matter of Rowland's suspension being "about the Union."

According to the testimony of Gilles and Ken Cess, they had a conference call to discuss Rowland's situation sometime after Rowland and Martinez met with Gilles on May 25. Also participating in the conference call were Yolanda Thomas and Hanita Hoffman, the Respondent's human resources director. Gilles testified that they discussed the fact that Rowland had been a good employee who had never previously been accused of any inappropriate conduct towards a resident. However, as there were three totally independent witnesses, namely the medical assistants from the doctor's office, who had no motivation to lie about Rowland, and who insisted that she had threatened Resident B, they made a collective decision to terminate Rowland for elder abuse.

On May 29, Gilles and Thimmesch met with Rowland and her union representative, Ron Rich. As the meeting began, Rowland handed Gilles a handwritten statement in which she denied that she had threatened Resident B, and claimed that her suspension was in retaliation for her union activity. (GC Exh. 10.) According to Gilles' testimony, she asked Rowland how Rowland had come to the conclusion that her termination was related to her union activity when three impartial witnesses had accused her of abusing the resident. Rowland had no answer, at which point Gilles indicated that based on the unequivocal accounts of the three medical assistants, she had no choice but to terminate Rowland. Gilles gave Rowland a termination notice stating that Rowland was being fired for violating the Respondent's elder abuse policy by yelling at a resident. In turn, Rowland wrote on the corrective action form that Gilles had not properly investigated the claim against her by not interviewing the van driver. (GC Exh. 11.) Of course, Gilles denied that Rowland's termination had anything to do with her union activity.

However, despite the fact that Rowland had been terminated, the Respondent decided to continue the investigation of whether she had actually threatened and yelled at Resident B. Although this seems fairly unusual, counsel for the Respondent justifies it in his post-hearing brief on the basis of "an abundance of caution." Gilles claims that she and other members of the management staff at the facility were distressed and upset at Rowland's termination, because Rowland had always been considered a good employee. Therefore, she implies that they were willing to continue the investigation in order to ensure that a mistake had not been made in terminating her.

The day following the termination, Gilles made another attempt to talk with the van driver, Lewis Johnson. According to Gilles, she called the van company and spoke with Johnson's dispatcher, asking to speak with Johnson. Allegedly the dispatcher called Gilles back later that day with a message from Johnson that Resident B screamed the entire time he was with her, and that he does not pay any attention to her, and just "tunes it out." Gilles memorialized the conversation with a file note. (R. Exh. 30). Johnson's testimony is similar, although he places the contact at about one week later. According to Johnson, his dispatcher informed him that Gilles was trying to talk with him about Rowland and Resident B. He told the dispatcher to inform Gilles that "nothing happened." Further, Ken Cess also made an attempt to talk with Johnson, leaving a message for him with the dispatcher. However, Johnson never returned the call, testifying that he lost Cess' call back number. In any event, it is clear to the undersigned that for whatever reason, Johnson was not anxious to talk with the Respondent's managers about the Rowland incident.

Finally, Cess made his own contact with two of the three medical assistants from the doctor's office. He interviewed Terra Pagnano and Lindsay Murphy, as they confirmed in their trial testimony. While it is uncertain exactly when Cess interviewed them, it appears to have been shortly after Rowland was terminated. The third medical assistant was unavailable on that occasion. According to Cess, he wanted to satisfy himself that there was no doubt in the minds of these witnesses as to what

they had observed, so he went to Redding to conduct the interviews. Cess testified that both women indicated that "they hear two distinct voices," and that the threat was from the "second female voice," not the resident, and was made in a "harsh tone."

It should be noted that on May 24, Gilles reported the Rowland/Resident B incident to the State of California, Department of Public Health, as well as to the Ombudsman. Gilles testified that she did not report the incident to the police because "the resident wasn't in danger of being physically harmed." The state investigated the claim and ultimately concluded that there were "no deficiencies," as the Respondent had complied with state and federal law and its own policies in promptly reporting and investigating the incident. (GC Exh. 12, 21.) Also, it should be mentioned that Rowland testified that she still has her CNA license, which was not revoked as a result of the incident being reported to the state. (GC Exh. 13.)

IV. ANALYSIS AND CONCLUSIONS

A. The Termination of Denise Whitmire

It is alleged in complaint paragraphs 7(a), (b), and (12) that the Respondent suspended and then terminated Denise Whitmire because of her union activity. However, the Respondent alleges that Whitmire was disciplined because she failed to report suspected elder abuse and destroyed evidence relating to that possible abuse. Therefore, it is necessary to determine the Respondent's motive in suspending and subsequently discharging Whitmire.

In *Wright Line,,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.,* 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has made a *prima facie* showing that Whitmire's union activity was a motivating factor in the Respondent's decision to suspend and subsequently terminate her. In *Tracker Marine, L.L.C.,* 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line.* Under the framework, the judge held that the General Counsel must establish four elements by a preponderance of evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. However, more recently the Board has stated that, "Board cases typically do not include [the fourth element] as an independent element." *Wal-Mart Stores, Inc.,* 352 NLRB 815, fn.5 (2008) (citing *Gelita USA, Inc.,* 352 NLRB 406, 407 fn.2 (2008); *SFO Good-Nite Inn, L.L.C.,* 352 NLRB 268, 269 (2008); Also see *Praxair Distribution, Inc.,* 357 NLRB No. 91, fn.2 (2011). In any event, to rebut the presumption, the Respondent bears the burden of showing the same action would have taken place even in the absence of protected conduct. See *Manno Electric, Inc.,* 321 NLRB 278, 280, fn.12 (1996); *Farmer Bros., Co.,* 303 NLRB 638, 649 (1991).

As I have already found in the facts section of this decision, Whitmire engaged in significant union activities. Further, it is clear that those union activities were well known to the Respondent's management. For 18 months, during protracted contract negotiations, she served on the union bargaining committee and sat opposite management representatives, was visible to management while participating in two union picketing actions, and her personal car parked near the facility displaying prounion signs was also visible to management representatives.

Also, Gilles expressed animus towards the Union and a personal dislike for Whitmire because she was a union supporter. Former payroll clerk Denise Henschel testified that Gilles told her that she should not be having lunch or taking smoking breaks with Whitmire as Whitmire "was part of the Union, and you had to watch what you said around her." When Whitmire applied for and interviewed for a housekeeping supervisor position in October 2011, Gilles commented to Henschel in reference to Whitmire that she could not understand why anybody would apply for a supervisory position when "they caused so many problems at the facility; [and] who would ever consider them for a supervisory position." Ultimately Whitmire was denied the promotion to supervisor. Further, Gilles' animosity towards Whitmire was confirmed by CNA Frances Marley who testified that she heard Gilles tell the "medical records lady" that "she hated Denise Whitmire because [Whitmire's] got a big mouth."

Despite counsel for the Respondent's contention that Marley is biased because she is a union supporter and that Henschel is biased because she was terminated by Gilles, I believe that both women testified credibly. Their testimony seemed genuine, and, to some extent, they corroborated each other's testimony. Marley's testimony is especially likely to be truthful, as she is a current employee who is testifying against her employer's interest, to her potential detriment. It is appropriate to assume that Marley wishes to keep her job, and, therefore, is only testifying against the interests of her employer because telling the truth requires her to do so. See *Samaritan Medical Center,* 319 NLRB 392, 396 fn. 12 (1995); *Hi-Tec Cable Corp.,* 318 NLRB 280, 295 (1995), enf. granted in part, denied in part, 128 F.3d 271 (5th Cir. 1997); *Gold Standard Enterprises,* 234 NLRB 618 (1978); *D & H Mfg. Co.,* 239 NLRB 393, 396 (1978).

The facts have also shown that Gilles expressed unhappiness with the prounion signs that employees placed in their cars where they could be seen by members of the public, one of those employees being Whitmire. Thus, there certainly appears

to be a nexus or connection between Whitmire's union activity and her suspension and subsequent discharge.

Accordingly, I believe that counsel for the Acting General Counsel has presented all the elements necessary to establish a *prima facie* case that the Respondent was motivated to take disciplinary action against Whitmire, at least in part, because of her union activity. The burden now shifts to the Respondent to show that it would have taken the same disciplinary action against Whitmire absent her union activity. *Senior Citizen Coordinating Counsel of Riverbay Community,* 330 NLRB 1100 (2000); *Regal Recycling, Inc.,* 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co..,* 310 NLRB 865, 871 (1993). I am of the view that the Respondent has met this burden.

The Respondent has successfully demonstrated that it is very serious about preventing elder abuse and reporting any suspected abuse. Such a policy is mandated by both state and federal law, as well as the Respondent's internal procedures, and the consequences of a failure to do so are quite sever, consisting of both civil and criminal penalties. The law requires that "mandated reporters," such as Whitmire, report any suspected abuse to the proper state authorities, and the Respondent's internal procedures require that such suspected abuse also be reported to the Respondent's managers. The Respondent administers training to its staff at least twice a year regarding what constitutes abuse, how to spot suspected abuse, the specifics on reporting such abuse, and the penalties for failing to do so. The recipients of the training are required to sign a document acknowledging receipt of that training. Whitmire testified that she repeatedly received such training, understood that she was a "mandated reporter," and was familiar with the requirements that she report suspected abuse.

In my view, Whitmire exercised very poor judgment. She found a note left by a resident, who provided her name, which note gave a message appearing to be a "cry for help." A reasonable reading of the note, "They took my house, and now they are going to kill me," should have alerted any mandated reporter that this was something that should have been taken very seriously and immediately reported to a manager, and then on to the state authorities. Whitmire's testimony regarding the finding of the note, the legibility of the note, and her decision to discard it as trash is simply not credible.

The more Whitmire testified about the note, the more her story changed. She continually described the note as Kleenex, as if the type of paper on which it was written somehow lessened its importance. Further, while she initially seemed to claim that she believed it to be the product of a transient who had been in the building the night before, she admitted that later, while she was still in possession of the note, she understood it contained the name of a current resident of the facility. Her repeated reference to the writing on the note as "chicken scratchings" and looking like a crossword puzzle was disingenuous, as she admitted that she could read what the note said.

Whitmire's decision to discard the note as "trash" appeared to be contrary to everything that she had been exposed to in training as to how to respond to suspected abuse. She looks to blame the CNAs who were in the lobby at the time she found the note for giving her bad advice. The note was identified as coming from a resident who allegedly wrote this sort of thing all the time, for which reason she alleges the note was properly discarded as trash. However, the CNAs do not supervise the housekeepers, and as the finder of the note, Whitmire was responsible for the reporting requirement, not some other rank and file employee.

She failed to take any appropriate action regarding the note. She did not report it to a supervisor, made no effort to notify the state authorities, and took probably the worst course of action possible and discarded it. As it turned out, the note could not be retrieved as the trash had been removed from the facility by the time Gilles was made aware of the incident.

The Respondent investigated the incident. Counsel for the General Counsel challenges the thoroughness of the investigation, but really there was not much to investigate. The essential facts were not in dispute. Whitmire found a note from Resident A suggesting that somebody had taken her house and now intended to kill her. She disregarded her duties as a mandated reporter, threw the note away, and failed to take any of the actions required of a mandated reporter to alert the proper authorities. Following this investigation, Gilles immediately suspended Whitmire and prepared to terminate her, which Gilles subsequently did.

The Respondent did not have a progressive discipline policy, and considered the actions and inactions of Whitmire so egregious as to warrant termination. There was no probative evidence offered that a similar incident existed where the employee was not active in the Union and the discipline was handled differently. While counsel for the Acting General Counsel attempts to show disparate treatment by giving examples of other employees less severely disciplined, none of those examples are comparable to this situation where Whitmire not only ignored suspected abuse, but also destroyed the evidence of that abuse. In my view, such misconduct on the part of any employee, who was a mandated reporter, would likely have resulted in similar disciplinary action, even where said employee had engaged in no protected conduct.

Accordingly, based on the above, I conclude that the Respondent has met its burden of proof and established by a preponderance of the evidence that Whitmire was suspended and subsequently terminated for cause. As such, the Respondent has rebutted the General Counsel's prima facie case and shown that it would have taken the same disciplinary action against Whitmire even in the absence of her having engaged in union activity. Therefore, I shall recommend to the Board that complaint paragraphs 7(a) and (b) be dismissed.

B. The Termination of Angela Rowland

It is alleged in complaint paragraphs 8(a), 8(b) and (12) that the Respondent suspended and then terminated Angela Rowland because of her union activity. However, the Respondent alleges that Rowland was disciplined because she engaged in elder abuse by screaming a threat to physically harm a resident of the facility. Therefore, it is necessary to determine the Respondent's motive in suspending and subsequently discharging Rowland.

Earlier I discussed at length the Board's causation test in all cases alleging violations of Section 8(a) (3) or violations of

Section 8(a)(1) turning on employer motivation. *Wright Line,* supra*; Tracker Marine,* supra*; Praxair Distribution,* supra. Under the Board's standard as enunciated in those cases, I believe that counsel for the Acting General Counsel has made a *prima facie* showing that Rowland's union activity was a motivating factor in the Respondent's decision to suspend and subsequently terminate her.

As I have already found in the facts section of this decision, Rowland engaged in significant union activities. Further, it is clear that those union activities were well known to the Respondent's management. For 18 months, during protracted contract negotiations, she served on the union bargaining committee and sat opposite management representatives, was visible to management while participating in two union picketing actions, was featured on the local news as a spokesperson for the Union, her personal car parked near the facility displaying prounion signs was also visible to management representatives, and she served as one of two shop stewards who attended disciplinary meetings between employees and managers.

Also, Gilles expressed animus towards the Union, including specifically certain union activity engaged in by Rowland. As I noted earlier, Gilles expressed feelings of hostility towards the Union, expressing to payroll clerk Denise Henschel her desire that Henschel not take a smoking break with an employee (Denise Whitmire) who "was part of the Union."

Specifically regarding Rowland, on May 25, during a meeting with Rowland and Alice Martinez where they discussed the circumstances surrounding Rowland's suspension, Gilles gratuitously brought up the subject of employees having prounion signs in their cars parked near the Respondent's facility. As part of the Union's campaign to obtain a fair first contract with the Respondent, certain employees, including Rowland, had been leaving prounion signs in their personal cars parked where they could be seem by members of the public and the Respondent's managers. Gilles was upset that messages on those signs which mentioned patient care could give the public a negative impression of the care provided to patients by the Respondent. She indicated that instead, the message on those signs should relate to the issue of the contract dispute and the employees' desire to obtain a fair contract. It was very telling that when Martinez told Gilles that she and Rowland had come to her to talk about Rowland's job, and not the Union, Gilles responded by saying, "Oh no. This is about the Union. This is all about the Union." Thus, there certainly appears to be a nexus or connection between Rowland's union activity and her suspension and subsequent discharge.

Accordingly, I believe that counsel for the Acting General Counsel has presented all the elements necessary to establish a *prima facie* case that the Respondent was motivated to take disciplinary action against Rowland, at least in part, because of her union activity. The burden now shifts to the Respondent to show that it would have taken the same disciplinary action against Rowland absent her union activity. *Senior Citizen Coordinating Counsel of Riverbay Community, supra; Regal Recycling, Inc.,* supra. The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Company,* supra. I am of the view that the Respondent has met this burden.

As I discussed above in detail, the Respondent has successfully demonstrated that it is very serious about preventing elder abuse and reporting any suspected abuse. The Respondent has acknowledged that Angela Rowland was a superior employee. She had never previously been accused of any sort of elder abuse. To the contrary, she was considered by management to be a kind caregiver, whose duties as a CNA and Restorative Nursing Assistant were performed with gentleness. According to Gilles, that was why the events of May 24 with Resident B were so distressing.

There is no dispute that if the incident of which Rowland is accused occurred, it would constitute elder abuse. She is accused of screaming in a harsh tone a threat of bodily harm to Resident B, specifically, "If you don't knock it off, I'm going to beat your ass." As discussed at length above, this followed a session of profanity laced screaming of threats by Resident B during the entire period of time that she was being transported from the nursing home to the doctor's office. Unfortunately, this was fairly typical behavior for Resident B who suffered from dementia and was sensitive to movement and weather.

Rowland denied that she made the threat of which she was accused. She denied saying anything of the sort to Resident B, and denied screaming or saying anything in a harsh tone directed at the patient who was in her care. She denied this conduct when it was first reported to her by Gilles, and continued her denials through the time that she testified at the trial before me.

I found Rowland to be a generally credible witness. She testified in a calm manner, not overly emotional, although clearly upset at the accusations being made against her. She seemed sincere, quiet in manner and tone, and gentle. I would not suspect her of losing her temper and of screaming a harsh threat against a patient under her care. Certainly her employment record supports her denials. She was well liked by the Respondent's staff, the residents, and their families. Even Resident B's family supported Rowland, telling Gilles that they suspected it was Resident B who was heard screaming the threat. Normally I would have credited Rowland's testimony that she did not engage in the conduct of which she is accused. However, this is not a normal case.

Resolving credibility is particularly difficult in this instance as there were three totally impartial witnesses who insisted repeatedly that Rowland did indeed say what she is accused of saying towards Resident B. The three medical assistants from the doctor's office, Terra Pagnano, Erica Catona, and Lindsay Murphy, had absolutely no reason to be biased or prejudiced. They had no personal relationship with Rowland and no monetary or employment incentive to fabricate their claims. They had brought the matter to the Respondent's attention, reaching out immediately after the alleged incident occurred to call the nursing home and report Rowland's conduct. It would appear that they had no reason for doing so, other than their concern that an elderly, vulnerable patient was being abused. Rowland herself could not offer any explanation as to why the medical assistants would make such a claim, other than they were simply wrong. Of course, counsel for the General Counsel suggests that perhaps they heard Resident B screaming the threat and simply mistakenly believed that the harsh words were spoken by Rowland.

All three medical assistants testified credibly. They were very detailed regarding what they heard and certain in their contention that it was Rowland who had screamed the threat. All three testified consistently and supported each other's version. As they had done when being interviewed by Gilles, Director of Nursing Thimmesch, and Ken Cess, they testified that they recognized Resident B's voice, heard two voices speaking, and heard the threatening words being screamed over the voice of Resident B. Although they did not see Rowland speaking, they are certain that they heard the threatening words coming from her.

The only other person who was possibly present at the time of Rowland's alleged abuse of Resident B was the van driver, Lewis Johnson. However, he was absent from the doctor's office for approximately 45 minutes, so it is entirely possible that even if Rowland made the threat in question, Johnson would not have heard it because of his absence. In any event, he testified that on the way to the doctor's office, Rowland had done her best to calm down Resident B. Further, he indicated that he never heard Rowland make the threat in question, or say anything similar to Resident B.

As I noted in the facts section of this decision, I did not find Johnson particularly credible. He seemed very reluctant to cooperate with the Respondent during the investigation of the incident. At best he seemed disinterested when contacted twice by Gilles and once by Cess. The only occasion where he was actually willing to speak to management was immediately after the incident allegedly occurred when Gilles arrived at the doctor's office pursuant to the complaint that Thimmesch had just received. On that occasion Johnson could hardly be bothered to look up from the electrical devise that he was playing with, and he merely curtly told Gilles that nothing happened and that he had seen nothing. He was much more animated when testifying at trial as he emphatically answered counsel for the General Counsel's question as to whether he had heard Rowland make the threat in question with the response, "Absolutely not." I find this dichotomy rather peculiar, and I have little confidence in Johnson's testimony.

So, I am left trying to make a decision as to which version of events as told by conflicting credible witnesses to accept. I believe that under these circumstances it is appropriate to select the version of events as told by the three medical assistants. They are totally neutral, with no reason to want to harm Rowland's reputation. Their testimony was consistent, they supported each other's version, and they were totally cooperative during both the Respondent's investigation of the incident and when testifying at the trial. Their original reporting of the incident to the Respondent's Director of Nursing was made in an effort to protect a patient who they saw as vulnerable, and not for any selfish or pecuniary motive.

While there is certainly some considerable doubt that Rowland made the threat that she is accused of, I believe the weight of the evidence supports the finding that the Respondent reached, which was that Rowland did in fact scream a threat of physical harm against Resident B. Perhaps Rowland was having a particularly bad day, or perhaps she had suddenly lost her temper under the constant barrage of screaming, threats, and profanity from Resident B. Human beings make mistakes, and perhaps Rowland made such a mistake and in a moment of weakness screamed back a threat towards Resident B. Under such circumstances, I believe that the Respondent was reasonable in reaching this conclusion.

Counsel for the General Counsel is highly critical of the investigation conducted by the Respondent and contends that it was superficial. To the contrary, I believe that the Respondent conducted a sufficient investigation. The three medical assistants were repeatedly interviewed and statements were taken from them. Rowland was afforded an opportunity to give her side of the story, and Gilles attempted to obtain the van driver's version of events, but he seemed rather uninterested in cooperating. The Respondent was faced with substantial, seemingly credible evidence that Rowland had screamed a threat of physical violence towards Resident B. Such conduct by an employee of a nursing home constituted obvious elder abuse. Gilles had complied with the legal requirement and immediately reported the incident to the appropriate state agencies. However, it was incumbent upon the Respondent to take some disciplinary action against the employee who had committed the offense. Under these circumstances, the Respondent's decision to suspend and subsequently terminate Rowland was not unreasonable.

Counsel for the General Counsel contends that the punishment issued to Rowland was disproportionate to the infraction, and, thus, demonstrates that it was a pretext for the real reason for termination, namely union activity. I disagree. A threat screamed at a nursing home resident to cause her physical harm is not a minor matter. It is extremely serious, and society views such conduct directed at vulnerable elderly people as such, which is evident by the abundance of state and federal laws designed to protect the elderly.

Further, counsel argues that other employees were not terminated for having been accused of similar conduct, and, thus, the Respondent engaged in disparate treatment towards Rowland, all in an effort to terminate her because of her union activity. However, the record evidence relied on by counsel does not support her contention. There were other employees accused of similar conduct, but the Respondent's investigations disclosed that no such conduct had occurred. Unfortunately, in the case of Rowland the investigation reasonably concluded that she had committed the offense of which she was accused. Also, where employees had actually been found to have engaged in improper conduct, that conduct was not analogous to Rowland's conduct. Threatening to "beat the ass" of Resident B as screamed by Rowland constituted very serious verbal abuse, only surpassed in noxious behavior by actual physical abuse.

Finally, I would note that one of the incidents that counsel for the General Counsel relies on to try and show disparate treatment because of union activity demonstrates just the opposite. Ron Rich was very active in the Union. He served as shop steward, and, like Rowland, was a union representative who attended disciplinary meetings, even representing Rowland in that capacity. In July of 2012, he had, coincidentally, been accused of having abused Resident B. Gilles considered the incident report, which came from an anonymous source, and determined that the person who reported Rich was apparently not familiar with Resident B and her behaviors. So, Gilles took

no disciplinary action against Rich, despite his union activity. (GC Exh. 16.) Unfortunately for Rowland, Gilles reasonably found sufficient evidence that Rowland had committed the offense for which she was accused.

As I said earlier, the Respondent did not have a progressive discipline policy, and considered the conduct of Rowland so egregious as to warrant termination. In my view, such misconduct on the part of any employee would likely have resulted in similar disciplinary action, even where said employee had engaged in no protected activity. No disparate treatment on the basis of union activity has been established.

Accordingly, based on the above, I conclude that the Respondent has met its burden of proof and established by a preponderance of the evidence that Rowland was suspended and subsequently terminated for cause. As such, the Respondent has rebutted the General Counsel's prima facie case and shown that it would have taken the same disciplinary action against Rowland even in the absence of her having engaged in union activity. Therefore, I shall recommend to the Board that complaint paragraphs 8(a) and (b) be dismissed.

C. The Granting of Wage Increases

It is alleged in complaint paragraphs 10(a) and 13 that the Respondent violated Section 8(a)(5) and (1) of the Act by stopping its "practice of granting wage increases" to the employees in the two units the Union represents "commensurate with their annual performance evaluations on or near the anniversary of their respective date of hire." During the trial, counsel for the General Counsel amended the complaint to reflect that the dates this alleged unfair labor practice occurred covered a finite period, from June 1, 2011 until August 1, 2012.

Preliminarily, I will note, that I found the facts allegedly supporting the General Counsel's theory of this violation very confusing. In my view, neither the testimonial nor documentary evidence is sufficient to meet the General Counsel's burden of proof. It is important to stress that no employee witness testified about this alleged past practice. The only witness for the General Counsel who did so was Jim Philliou, an employee of the Union and its principal contract negotiator with the Respondent and other nursing homes with which the Union has a collective-bargaining relationship. Philliou testified that various employees informed him regarding the Respondent's past practice. However, these employees did not testify. Thus, Philliou's testimony concerning what bargaining unit employees told him regarding the Respondent's alleged past practice as to wage increases constitutes inadmissible hearsay so far as it seeks to support the truth of the matter asserted.

According to Philliou's testimony, the Union learned from employees and company documents established that from at least 2005 until June 2011, the Respondent had a companywide policy of granting annual merit wage increases, which increases coincided with employees' annual performance evaluations and were usually in the 3-percent range. His testimony was directly contradicted by Ken Cess, the Respondent's regional director of operations. According to Cess, the Respondent had never had such a policy. He testified that annual merit wage increases were never guaranteed, and could range anywhere from zero to two, three, or four percent, depending upon a number of factors. Those factors included: the economics of the facility, what had been budgeted for that current year, an employee's individual performance, the industry, the wage index, competitive wages in the marketplace, what had been budget for the upcoming year, and Medi-Cal and Medicare reimbursement rates.

Counsel for the Respondent and counsel for the General Counsel engaged in a duel of documents to try and support their respective positions. However, I found these documents to be confusing, contradictory, and less than conclusive regarding whether a past practice existed or not, and, if it did exist, just what was that practice. In this regard, I am reminded of Mark Twain's pronouncement that "There are lies, damn lies, and statistics."

I found the most telling document to be the last of the Respondent's Employee Handbooks in effect before the Union was certified to represent the employees in the two units on January 21, 2011. This Handbook indicates that it was revised as of July 9, 2010. Under the heading "Performance Evaluations" it reads as follows: "You will receive periodic performance reviews. . . . [P]erformance evaluations will be conducted annually, on or around your anniversary date. The frequency of performance evaluations may vary depending upon length of service, job position, past performance, changes in job duties or recurring performance problems. Performance evaluations will include factors such as the quality and quantity of the work performed, knowledge of the job, initiative, work attitude and demeanor toward others. . . . Positive performance evaluations do not guarantee increases in salary or promotions. Salary increases and promotions are solely within the discretion of the Company and depend upon many factors in addition to performance." (R. Exh. 6, p. 8.) This document tends to support the testimony of Cess that under the Respondent's past practice, there was no guaranteed merit wage increase of any kind, and certainly not of a specific amount.

Counsel for the General Counsel contends that the Respondent's exhibit no. 35 shows that for the years 2009, 2010, and 2011 most of the employees received an annual wage increase of around 3 percent. However, as I view the document, while a majority of the employees do seem to have received an increase of around 3 percent, numerous other employees received no annual wage increase at all, some received an increase less than around 3 percent, and a few received an increase greater than 3 percent. (R. Exh. 35.) At least one other document purports to show that same information, albeit in a different form, but I found this document even more difficult to comprehend. (GC Exh. 6.)

The amended complaint sets forth a finite period for the alleged violation of June 1, 2011 to August 1, 2012. [17] This finite period corresponds with the time during which the Respondent learned that its reimbursement compensation from the State of California, through Medi-Cal, and from the Federal Government, through Medicare, was going to be drastically reduced. Cess testified that it was in August of 2011 that the Respondent

[17] Originally complaint par. 10(a) had alleged an open ended period beginning on June 1, 2011. Also, it should be noted that complaint pars. 10(b) and (c) were withdrawn during the hearing.

stopped providing merit increases of any kind to employees because it had been informed that it would be receiving companywide cuts from Medi-Cal of approximately 18 million dollars and Medicare cuts of approximately $17 million. This was a combined loss of revenue companywide of approximately $35 million. The General Counsel contends that it was actually 2 months earlier, in June of 2011, that the Respondent stopped providing merit increases to employees.

It is undisputed that in August 2011, Cess and another negotiator for the Respondent, Josh Sable, notified the Union that because of these unprecedented compensation cuts in Medi-Cal and Medicare that the Respondent would be discontinuing merit increases. Further, the Union was informed that if the Respondent was subsequently reimbursed from the State of California, which the State had apparently promised to do, that it would pay the employees retroactively for any merit increases that the Respondent believed they would have received. At the time it was the Union's position that the Respondent should be awarding all employees 3-percent merit increases, allegedly its past practice, that the Respondent could not unilaterally discontinue paying those merit increases, and that the Respondent was required to negotiate over this issue. On the other hand, Cess testified that the Respondent argued to the Union that it had no established past practice of granting 3-percent merit increases, that any increases previously granted were in part dependent upon Medi-Cal and Medicare funds being received, and that bargaining was not necessary as the Respondent was not deviating from its past practice. According to Cess, the Respondent resumed granting discretionary merit increases to employees in May of 2012 when the State of California indicated that the Medi-Cal compensation reduction would not be occurring.

As I indicated above, counsel for the General Counsel has failed to meet her burden of proof and establish that the Respondent had a regular past practice of granting annual merit increases to its employees of approximately 3 percent. I found Ken Cess to be a credible witness. His testimony that the Respondent's past practice was to grant only discretionary merit increases without any set amount, based on those factors set forth in its Employee Handbook and on the Respondent's financial condition was not rebutted by non-hearsay testimony, and I found the documentary evidence relied on by the General Counsel to be less than convincing. I found reasonable and credible Cess' testimony that the decision to grant a merit increase to an employee was based on a number of factors, as referenced in the Employee Handbook, including the employee's individual performance, which was the most significant factor in the decision, along with the economics of the facility. To the extent that a past practice existed at all, it was discretionary on the part of the Respondent, affording it the option of paying no merit increase, or, if warranted, such an increase could vary from one percent to amounts greater than 3 percent. The Respondent's last Employee Handbook in effect prior to the Union's certification certainly supports Cess' testimony. (R. Exh. 6, p. 8.)

In a similar case, the Board determined that an employer had not unlawfully discontinued its past practice of granting wage increases to employees where the employer offered credible evidence that the decision to award merit increases was highly subjective and dependent on numerous criteria, which criteria included the employee's skill and area of specialty, as well as the company budget. The Board found no basis for concluding that the employer had altered its past practice after the union was certified. Thus, there was no duty on the part of that employer to notify or bargain with the union as to wage increases.[18] *The News Journal Co.,* 331 NLRB 1331 (2000). Accordingly, in the matter at hand, I conclude that the Respondent did not alter its past practice after the Union was certified, and, therefore, it had no duty to notify or bargain with the Union.

Even assuming there existed a violation of the Act, that violation appears to have been remedied by the Respondent. It is undisputed that the parties reached an agreement on the terms of a collective-bargaining agreement effective on August 7, 2012. Both Cess and Philliou testified that the agreement reached between the parties contains language regarding merit pay raises. They both referenced language contained in the "Union's Proposal," which apparently was accepted by the Employer, as modified by the parties, and became the parties collective-bargaining agreement as of August 7, 2012. (GC Exh. 4, p. 18.) Under the heading "Wages," that language reads as follows: "Effective on the employee's anniversary date prior to August 1, 2012, each employee shall receive a wage increase of 1-3% accompanied by an evaluation supporting the amount of the wage increase." Then the next sentence reads: "Effective on the employee's anniversary date after August 1, 2012, each employee shall receive a 2% wage increase."

While his testimony was somewhat confusing, Cess appeared to testify that all of those employees who would have received merit increases, but for having their increases "frozen" as a result of the Medi-Cal and Medicare cuts, had those increases "unfrozen" and were given "retroactive increases." This action was taken pursuant to the terms of the parties collective-bargaining agreement, specifically the first of the two sentences quoted in the paragraph immediately above. He testified that the Respondent, "to the best of [its] ability," had, as of the date of the hearing, fully complied with this clause in its contract with the Union. In support of this contention, Cess makes reference to the Respondent's Exhibits numbers 33 and 34. Exhibit number 33 specifically shows a list of employees who appear to have received a retroactive wage increase of from one to one and a half percent. (As I noted earlier, I continue to find the Respondent's Exhibit number 34 confusing.)

Significantly, Philliou seems to largely confirm Cess' testimony. Philliou testified that pursuant to the terms of the collective-bargaining agreement reached by the parties, the Respondent is required to make retroactive payments to employees of from 1 to 3 percent. While he testified that those payments were limited to the period between January 1, 2012 and the contract's effective date of August 7, 2012, I see no such limiting language in the agreement. Further, the document relied on by the Respondent to support Cess' testimony shows the Respondent going back as early as 2010 to find a date for some employees' last merit increase. (R. Exh. 33.)

[18] Obviously, this occurred at a time before there was any collective-bargaining agreement in effect between the parties covering the matter of wages.

It is the Respondent's position that Cess' testimony, and the exhibits referenced in his testimony, show that any failure to make merit increases, assuming there was such a past practice, have now been remedied by the retroactive payments. Unfortunately, counsel for the General Counsel does not address this issue in her posthearing brief. However, I will assume that she does not agree with counsel for the Respondent's position, as there has been no motion to withdraw paragraph 10(a) from the complaint. I am essentially in agreement with the Respondent's argument.

In summary, I have found that counsel for the General Counsel has failed to meet her burden of proving by a preponderance of the evidence that the Respondent had a regular past practice of awarding merit increases of approximately 3 percent, which it unilaterally discontinued after the Union was certified to represent the two units of employees. To the contrary, the evidence demonstrates that any decision to award merit increases was discretionary on the part of the Respondent, with no set amount of increase or even any increase at all as part of a past practice.[19] Accordingly, the General Counsel has not established that the Respondent's failure to award merit increases between June 1, 2011 and August 1, 2012 constituted a violation of the Act.

Even assuming, for the sake of argument, that the Respondent did unlawfully discontinue a past practice of granting merit increases of approximately 3 percent, the parties appear to have resolved this issue between them. The collective-bargaining agreement provides for the payment of retroactive wages for any employees whose wages were frozen during the time period set forth in the complaint. Thus, the underlying dispute has been resolved contractually. Further, the Respondent has for all practical purposes remedied any potential violation of the Act by payment to the impacted employees of their frozen wages. Under these circumstances, any violation of the Act would seem to be moot.

Accordingly, based on the above, and the record as a whole, I shall recommend to the Board that complaint paragraph 10(a) be dismissed.

D. Discipline without Bargaining

In complaint paragraphs 11(a) and (b), and 13, counsel for the Acting General Counsel alleges that the Respondent violated the Act by failing and refusing to bargain with the Union over its decisions to suspend and terminate Whitmire and Rowland and over the effects of those suspensions and terminations. In her brief, counsel refers to such an alleged bargaining obligation as pre-termination and posttermination bargaining. Counsel for the Respondent denies any such legal obligation.

1. Pretermination bargaining

Counsel for the Acting General Counsel asserts that the Union made two requests to engage in predisciplinary bargaining. The first request was allegedly made on April 22, 2011, at the bargaining table with the Respondent's representatives. Philliou testified that his bargaining notes from that date reflect those efforts to engage in pretermination bargaining. (GC Exh. 5.) To the extent that his bargaining notes are legible, it appears that there are two references to employee *discipline* within his notes. Specifically, one reference reads, "bargain disciplines," with a three-sided box drawn around the words. A second reference made on that same date reads, "Jp- want to bargain any individual disciplines as well." Presumably, "JP" stands for Jim Philliou.

Counsel for the Acting General Counsel alleges that the Union made a second request of the Respondent to engage in pretermination bargaining in the form of an email string between the Union and the Employer. (GC Exh. 8.) In an email dated April 23, 2011, from Jorge Rivera, a union representative, to Josh Sable, an employer representative, with a copy to Philliou, Rivera says, "Were [sic] giving you notice of our demand to bargain over pre disciplinary pre discharge application of this policy as it arises will provide you specific names and address this on a case by case basis. We have rights to bargain in the contract attendance provisions and there [sic] application."

The record also contains a later email string with an email dated May 12, 2011, from Jorge Rivera to Josh Sable saying, "And our previous conversations regarding our on-going position to bargain over unilateral changes including pre disciplinary discharge unilateral changes regarding the absenteeism policy and other company policies and practices and changes, I have created a list below of issues we demand to bargain over immediately. We also call upon the company to sieze [sic] and desist making unilateral changes and that the company make workers whole and bargain over all of the following." There then appears a list of subjects over which the Union wants to bargain, the first of which subjects is headed, "1. Unilateral changes on disciplines we've demanded to bargain over [the following.]" Next there appears five specific employee names, listed a through e, with specific reasons given for their terminations. (GC Exh. 8.)

Based on the evidence presented, I have no reason to doubt Philliou's testimony that the subject of bargaining over prediscipline decisions was raised by the Union at the bargaining table with management on April 22, 2011, and that on April 23 and May 12, 2011, that same issue was raised in the specific context as is reflected in the two email strings. However, I believe that a general request to bargain over disciplines made on April 22, during the ongoing contract negotiations, and then in two email strings where the demand to bargain on April 23 was related to an attendance policy, and the demand to bargain on May 12 was related to specific named employees, did not create a separate, specific request to bargain over the terminations of Whitmire and Rowland, two different employees, who were terminated for unique reasons.

Board law is instructive as to whether the Respondent violated Sections 8(a)(5) and (1) of the Act by failing to engage in pretermination bargaining with the Union over the terminations of Whitmire and Rowland. It is well settled that, once a majority of a group of employees selects a union to represent a specific unit, an employer must bargain with the union regarding mandatory topics of bargaining, wages, hours, and terms and conditions of employment-and may not unilaterally alter the

[19] Although, as noted earlier, such discretion on the part of the Respondent was not totally unfettered, as it was based on the factors set forth in the Employee Handbook (R. Exh. 6, p. 8.), as well as the Respondent's financial situation.

terms of any of those respective bargaining topics. *Eugene Iovine, Inc.,* 328 NLRB 294, 296 (1999). An employer does not have a general obligation to notify and bargain to impasse with the union before imposing discipline; however, an employer does have an obligation to bargain, upon request by the union, concerning discharge, discipline, or reinstatement of employees. *Fresno Bee,* 337 NLRB 1161, 1187 (2002). This duty holds, however, only when the union seeks to engage in before-the-fact bargaining. *Washoe Medical Center, Inc.,* 337 NLRB 202, 202 fn. 1 (2001). In *Washoe,* affirming the adminstraive law judge's recommended dismissal of the allegations claiming that the respondent unlawfully failed to bargain before-the-fact with the union regarding employee discipline, the Board noted that the record did not establish that the union, at anytime, sought to engage in bargaining before-the-fact—i.e., bargaining "before the planned imposition of *specific discipline on particular employees."* Id. (emphasis added by the undersigned). The administrative law judge specifically noted, and the Board affirmed, that the respondent issued various forms of discipline to employees, between the time of the union election and the unfair labor practice hearing and, even though a union representative requested to participate in an employee's suspension appeal, the union did not request that the employer bargain over any of the disciplinary actions issued. Id. at 205.

Applying this precedent to the record evidence in the matter at hand demonstrates that the Respondent did not commit a violation of the Act by failing to engage in before-the–fact bargaining regarding the suspensions and terminations of Whitmire or Rowland. The Union's requests to bargain, as noted above, occurring at the bargaining table on April 22, 2011, and in email strings on April 23 and May 12, 2011, were insufficient to serve as a foundation upon which a failure to bargain violation can be found given the record evidence herein.

Before-fact-bargaining is, as the Board has noted, defined as bargaining regarding the "planned imposition of *specific discipline on particular employees." Washoe Medical Center, Inc.,* 337 NLRB at 202 fn. 1 (emphasis added by me). However, the Union's three requests to bargain over discipline were neither specific in terms of the discipline awarded, nor with regards to Whitmire or Rowland. Those two employees who were suspended and then ultimately fired specifically for, in the case of Whitmire, failure to report elder abuse and destroying evidence, and, in the case of Rowland, for elder abuse, were never specifically named by the Union, nor was the specific cause of their suspensions and terminations ever raised by the Union as the type of discipline over which it was requesting before-fact-bargaining. Thus, counsel for the General Counsel is unable to substantiate a legally viable claim that the Respondent failed to engage in before-the-fact bargaining with the Union.

The Union's first request to bargain over disciplines is memorialized in Philliou's bargaining notes dated April 22, 2011. (GC Exh. 5.) These bargaining notes consist of a multiple page document of partially illegible handwritten notes that cover various bargaining topics including, but not limited to, attendance, absences, scheduling, benefits, workers' compensation measurements, mechanical equipment, health plans, etc…stretching over various dates. On their face, they are by no means specific or particular. They obviously do not related to Whitmire and Rowland or to their unique and specific circumstances, as those two employees had yet to commit the offenses for which they were ultimately terminated.

Again, these notes fail the before-the-fact specificity that is required under Board law. Rather, the bargaining notes assert vanilla, bland, cryptic, general propositions that amount to nothing more than the Union's request to have a participatory voice generally in the employee *disciplinary* process and not specific requests to engage in before-the-fact bargaining with respect to the specific discipline, namely suspension and termination, of specific employees Whitmire and Rowland.

It is worth noting that one of the other bargaining topics contained within the notes and written in proximity to the requests to engage in pre-discipline bargaining, were notes regarding attendance. (GC Exh. 5.) This is telling as to the interpretation of the bargaining notes and what Philliou actually said at the bargaining table. To the extent that the notes show a specific request to bargain employee discipline, they appear to establish that what Philliou was actually referring to was discipline for violation of the Employer's attendance policy, obviously very different from the reasons for which Whitmire and Rowland were terminated.

This focus by the Union on those employees disciplined for a violation of the Respondent's attendance policy is further evident from the two email strings, which counsel for the Acting General Counsel argues also show the Union's desire to engage in prediscipline bargaining. In the email dated April 23, 2011, one day following the bargaining session where Philliou first raised the issue of bargaining over discipline, there is a reference to "pre disciplinary pre discharge application of this *policy . . .,"* which policy the next sentence describes as "attendance provisions." (GC Exh. 8.) (emphasis added by the undersigned). Similarly, the email dated May 12, 2011, which refers to the Union's desire to engage in "pre disciplinary pre discharge" bargaining, continues to stress the Union's concern with the Respondent's "absenteeism policy." (GC Exh. 8.) Of course, the terminations of Whitmire and Rowland, which involved the issue of elder abuse and the duties of mandatory reporters, were not in the slightest way related to any attendance issues.

Further, to the extent that the May 12 email references five named employees, four of whom were disciplined for reasons other than absenteeism, it obviously does so to the exclusion of Whitmire and Rowland, who had not yet engaged in the conduct for which they were ultimately terminated. Even more significant, none of the reasons given for the Respondent having disciplined the five employees, on whose behalf the Union wished to negotiate, concerned the issue of elder abuse, or was in any way as egregious or legally significant as the reasons for which Whitmire and Rowland were disciplined. (GC Exh. 8.) The facts surrounding the suspensions and terminations of Whitmire and Rowland were unique, and there is no indication in Philliou's testimony or in any of the documents offered to support that testimony as would show that the Union ever informed the Respondent that it wanted to engage in pre-discipline bargaining regarding employees who had either engaged in elder abuse or failed to report such abuse. In my view,

nothing said at the bargaining table, as reflected in Philliou's notes, or in the two email messages in evidence would serve to give the Respondent notice that the Union wished to bargain over the issue of discipline to be given to employees similarly situated to Whitmire or Rowland.

The contents of the three exhibits in evidence, as well as the testimony of Philliou, which those exhibits are intended to support, are insufficient to serve as the underlying foundation upon which to establish that the Respondent violated the Act by failing to engage in pre-discipline bargaining. Based on those facts and the case authority, I believe that there is a lack of specificity regarding the type of discipline or the type of employee misconduct upon which to premise a violation of Section 8(a)(5) of the Act. The Union's requests to engage in pre-discipline bargaining were too nebulous, too ambiguous, and too general to serve as a predicate and trigger a responsibility on the part of the Respondent to bargain with the Union before suspending and terminating Whitmire and Rowland.

Counsel for the Acting General Counsel has failed to support the allegation that the Respondent violated the Act by failing to negotiate with the Union prior to suspending and terminating Whitmire and Rowland. Accordingly, I shall recommend to the Board that complaint paragraph 11, and its subparagraphs, and paragraph 13, as they relate to the Respondent's failure to engage in pre-disciplinary bargaining regarding Whitmire and Rowland be dismissed.

2. Posttermination bargaining

Counsel for the Acting General Counsel also asserts that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to engage in post-termination negotiations with the Union regarding the discharges of Whitmire and Rowland. However, in my view there is a paucity of evidence to support this contention, and the General Counsel is "reaching" in an effort to find such a violation.

N.K. Parker Transport, Inc., 332 NLRB 547, 551 (2000), is correctly cited by counsel for the Acting General Counsel for the proposition that terminations are a mandatory subject of bargaining, and, *upon request* by a union representing the employees, an employer has an obligation to bargain regarding the termination of unit employees. Further, for a request to be deemed a valid bargaining request, it does not have to be "made in any particular form, or in haec verba . . ." *Eldorado, Inc.,* 335 NLRB 952, 953–954 (2001) (citing *Marysville Travelodge,* 233 NLRB 527, 532 (1977), enfd. 637 F.2d 139 (9th Cir. 1981)). A bargaining request is valid "so long as the request clearly indicates a desire to negotiate and bargain on behalf of employees…concerning wages, hours, and other terms and conditions of employment." Id. Still, the union must make some *request* of the employer to bargain, which request, in whatever form it is made, must be recognizable as such.

In the matter before me, I find no such request to have been made. In the case of Whitmire's termination, counsel for the Acting General counsel contends that the Union's request for Whitmire's personnel file following her discharge constituted such a request. The only record evidence that a file was requested comes from Administrator Gilles' testimony that at the time she terminated Whitmire, she so notified the Union. Thereafter, about 1 month later, Gilles received an email from a woman with the Union who requested Whitmire's "file," which was then apparently provided. According to Gilles, she never heard back from the Union that they wanted to talk about, discuss, or negotiate over Whitmire's termination. In fact, there was no further communication from the Union at all regarding Whitmire's termination.

I disagree with counsel for the Acting General Counsel. I do not believe that it would have been reasonable for Gilles to have concluded that the Union's request for Whitmire's personnel file constituted a request to bargain over the termination when no other action on the part of the Union demonstrated such a desire.[20] The case law does not require the Employer to be a "mind reader." The Union's dormancy and idleness regarding Whitmire's termination should not be rewarded by a finding that the Employer was refusing to bargain. More must be required to trigger a request to bargain.

In any event, counsel for the Acting General Counsel further argues in her brief that the Union's filing of unfair labor practice charges with the Board regarding the terminations of Whitmire and Rowland "explicitly" indicated a desire to negotiate and bargain over those terminations. Apparently, counsel is of the belief that upon being served with the charges, and facing the prospects of the Agency's investigation, the Employer should have immediately offered to bargain over the terminations. Frankly, I find this rather unrealistic, as I think it more likely that faced with unfair labor practice charges, the Employer's first order of business would be to prepare its defense.

Moreover, the extant case law does not support counsel's contention. She cites *Williams Enterprises,* 312 NLRB 937, 938-939 (1993), which stands for the broad proposition that a formal charge can serve as a bargaining demand. In *Williams Enterprises,,* the Board noted that "an 8(a)(5) charge, standing alone, *can* constitute a demand for recognition" when considering whether the employer's challenge of the union's request to bargain violated Section 8(a)(5) of the Act. Id. (emphasis added). However, in evaluating the Board's statement, and, therefore, the subsequent weight to be given to counsel for the Acting General Counsel's argument, it is necessary to trace the history and context in which this proposition originates.

In *Williams Enterprises,* Id., the Board relied on *Sterling Processing Corp.,* 291 NLRB 208, 217 (1988) (citing *Roberts Electric Co.,* 227 NLRB 1312, 1319 (1977), and *Sewanee Coal Operators Assn.,* 167 NLRB 172 fn. 3 (1976), enf. denied sub nom. *Tennessee Products & Chemical Corp. v. NLRB*, 423 F.2d 169 (6th Cir. 1970)). In *Roberts Electric Co.,* the administrative law judge whose 8(a)(5) violation finding was affirmed by the Board, noted that the filing of charges acted as a *renewal* of a request to bargain where the respondent contended that it did not receive any of the local union's multiple letters requesting

[20] The facts in the case at hand are distinguishable from *Oak Rubber Co.,* 277 NLRB 1322, 1323 (1985), enf. denied 816 F.2d 681 (6th Cir. 1987) (finding that an information request made about the same time as a request to "try and work out any problems" sufficient to trigger a bargaining request); and *Marysville Travelodge, supra* (finding a union representative's statement that he "was going to see if he could get their job back or do what he could for them" was sufficient to trigger a bargaining obligation).

bargaining. 227 NLRB at 1319. In *Sewanee Coal Operators Assn.,* the Board noted the *renewa*l of the union's multiple requests via letter to bargain and that the *renewal* constituted a "clear and unmistakable notice to the Respondent that the Union intended to exercise the rights flowing from its certification" and was therefore "tantamount to an explicit request to bargain." 167 NLRB 172 fn. 3, 180 fn. 27 (1967).

The four above cited cases, *Williams Enterprises, Sterling Processing, Roberts Electric,* and *Sewanee Coal Operators Assn.,* all involved situations where those employers were generally refusing to recognize and bargain with the unions representing their employees, and where requests had been made by those unions to bargain. Thus, the setting in which the Board has found the filing of formal charges to be a request to bargain has been under circumstances in which the union had previously requested recognition and/or bargaining with the employer, and the employer had stonewalled the union and failed to recognize its existence even for the purposes of general bargaining. This is not the case here.

In the matter before me, the Respondent has recognized and engaged the Union in, presumably, good faith bargaining, as the parties have reached the terms of a first contract. As I found above, the Union did not, prior to the filing of the unfair labor practice charges, notify the Respondent of its desire to engage in posttermination bargaining. Therefore, even assuming, *arguendo,* that the Union finally did so by filing formal charges, the Board case law shows that formal charges have served as a request to bargain only when combined with other valid attempts to put the employer on notice of the union's intentions. This is simply not what happened here, as formal charges did not serve as a *renewal* of a nonexistent prior request to bargain.

As explained above, I have concluded that prior to filing formal charges, the Union made no effort to contact the Employer and request post-termination bargaining. Under these circumstances, the Union did not do its "due diligence." *AT&T Corp.,* 337 NLRB 689 (2002). In *AT&T Corp*., the Board considered a case where, after a conference call in which the local union president requested information to protest the closure of a facility, he filed an 8(a)(5) charge for refusing to bargain over the decision to close the facility and for refusing to provide necessary information he requested during the call. The Board noted that, while in other cases it has found the filing of a refusal-to-bargain charge as a renewal of the union's request to bargain, that was not the situation under the facts at bar, as the local union president did nothing to followup the initial phone conference he had to protest the decision to close the facility; and, therefore, the local union president had demonstrated a lack of "due diligence" in pursuing bargaining regarding the facility closure. Id. at 692–693. As the local union president did nothing to followup on his original phone call to protest the closure of the facility, other than file unfair labor practice charges, the Board concluded that was insufficient to find a violation of the Act.

Analogously, the record evidence in the case before me demonstrates that the Union behaved in a similar, but even more negligent manner. Beyond the mere filing of unfair labor charges to challenge the discipline of Rowland and Whitmire, the Union took no steps to protest said terminations and trigger a bargaining obligation for the Respondent.

Counsel for the Acting General Counsel has failed to meet her burden of proof and establish by a preponderance of evidence that the Respondent violated Section 8(a)(5) of the Act. Accordingly, based on the above, and the record as a whole, I shall recommend to the Board that complaint paragraph 11, and its subparagraphs, and paragraph 13, as they relate to a failure to engage in post-termination bargaining, be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Windsor Redding Care Center, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, SEIU United Service Workers-West, CTW, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit (the unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act (the service and maintenance unit): "All full-time and regular part-time certified nursing assistants, restorative nursing assistants, dietary aides, cooks, housekeepers, laundry aides, activities assistants, social services employees, medical records employees, receptionists and admissions coordinators employed by the Employer at its 2490 Court Street, Redding, California facility; excluding all other employees . . . guards and supervisors as defined by the Act."

4. At all material times, since January 21, 2011, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the above-described service and maintenance unit.

5. The following employees of the Respondent constitute a unit (the unit) appropriate for the purposes of collective bargaining with the meaning of Section 9(b) of the Act (the licensed vocational nurses unit): "All full-time and regular part-time licensed vocational nurses; excluding all other employees, office clerical employees, guards, managers, and supervisors as defined by the Act."

6. At all material times, since January 21, 2011, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the above described licensed vocational nurses unit.

7. The Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The complaint is dismissed in its entirety.

Dated at Washington, D.C. December 31, 2012

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Windsor Redding Care Center, LLC *and* SEIU United Service Workers-West, CTW, CLC Cases 20–CA–070465, 20–CA–070964, 20–CA–075426, and 20–CA–082287

CORRECTION

On July 17, 2018, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding in which beginning on pages 21 through 25, after the first full paragraph, beginning with the sentence: **"As I have already found . . ."** to before section: **"1. Pretermination Bargaining" text** is inadvertently omitted from the decision.

The decision is corrected to reflect this omission. The attached decision is substituted for the one previously issued.

Dated, Washington, D.C. August 15, 2018

McKE
Redding, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WINDSOR REDDING CARE CENTER, LLC		
	Cases	20-CA-070465
and		20-CA-070964
		20-CA-075426
SEIU UNITED SERVICE WORKERS-WEST, CTW, CLC		20-CA-082287

ORDER DENYING MOTION FOR RECONSIDERATION[1]

The Respondent's Motion for Reconsideration of the Board's Decision and Order reported at 366 NLRB No. 127 (2018)[2] is denied. The Respondent has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration under Rule 102.48(c)(1).[3]

Dated, Washington, D.C., November 2, 2018.

LAUREN McFERRAN, MEMBER

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

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[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Board's Decision and Order inadvertently omitted portions of the judge's decision. On August 15, 2018, the Board issued an erratum to correct this oversight.

[3] The Respondent moves for reconsideration only with respect to the Board's conclusion that the Respondent terminated employee Angela Rowland in violation of Sec. 8(a)(3) and (1). While Member Emanuel adheres to the views expressed in his separate opinion regarding Rowland's termination, he nevertheless agrees that the Respondent has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration of that issue.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

WINDSOR REDDING CARE CENTER, LLC, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. _____ [NLRB CASE NOS. 20-CA-070465, 20-CA-070964, 20-CA-075426, 20-CA-082287]

CORPORATE DISCLOSURE STATEMENT

Petitioner Windsor Redding Care Center, LLC, d/b/a Windsor Redding Care Center, has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

DATED: November 2, 2018

Respectfully submitted,

BALLARD ROSENBERG
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UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

WINDSOR REDDING CARE CENTER, LLC, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. _____ [NLRB CASE NOS. 20-CA-070465, 20-CA-070964, 20-CA-075426, 20-CA-082287]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on November 2, 2018, I served a copy of the documents described as **PETITION FOR REVIEW** and **CORPORATE DISCLOSURE STATEMENT** by first class mail, postage prepaid, to:

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